Office-Supreme Court, U.S.
FILED
JUL 17 1981
ALEXANDER L. STEVAS,
CLERK

81-1184

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KEMLON PRODUCTS AND DEVELOPMENT COMPANY, KEYSTONE ENGINEERING COMPANY, SANDIFORD AND MARGARET RING, RUSSELL K. AND EVA M. RING, WILLIAM S. RING, JOHN H. AND J. GAIDEN RING,
Petitioners

v.

THE UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, ROBERT M. MCKEEVER, DISTRICT DIRECTOR OF THE AUSTIN DISTRICT, GARY D. BROWN, INTERNAL REVENUE AGENT, ROBERT ELIASON, INTERNAL REVENUE AGENT,
Respondents

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

EDWARD D. URQUHART
SPONSEL, URQUHART & ROSS
50 Briar Hollow Lane
Suite 320 West
Houston, Texas 77027
713/840-0920
Attorney for Petitioners

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

QUESTION PRESENTED

Whether a taxpayer's constitutional right to privacy and confidentiality is afforded adequate due process protection by 26 U.S.C.A. §7217.[1]

1. The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF CONTENTS	II
TABLE OF AUTHORITIES	II
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE FACTS	3
REASONS FOR GRANTING THE WRIT	8
APPENDIX	A-1

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV 2, 15
U.S. Const. Amend. V 2, 15

STATUTES

Privacy Act of 1974:
5 U.S.C.A. Sec. 552a(b) 5, 7

Internal Revenue Code of 1954:
26 U.S.C.A. Sec. 6103(a) 3, 14, 15, 16, 18
26 U.S.C.A. Sec. 6103(b) 3, 14, 15, 16, 18
26 U.S.C.A. Sec. 6103(k)(6) 3, 5, 6, 7
26 U.S.C.A. Sec. 6861 ..... 3, 12
26 U.S.C.A. Sec. 6863 ..... 3, 12
26 U.S.C.A. Sec. 7217 .....3, 7, 11, 12
26 U.S.C.A. Sec. 7421(a) 3, 5
26 U.S.C.A. Sec. 7429 ..... 3, 12

CASES

	Page
Becker v. U.S., 451 U.S. ____ (1981), 81-1 U.S.T.C. ¶ 9465	17
Commissioner v. Shapiro, 424 U.S. 614 (1976)	5, 6, 7, 8, 9, 10, 11, 12, 13
Enochs v. Williams Packing and Navigation Company, 370 U.S. 1 (1962)	5, 6, 9
Fuentes v. Shevin, 407 U.S. 67	11
G. M. Leasing Corp. v. U.S., 429 U.S. 338 (1977)	15
Griswold v. Connecticut, 381 U.S. 479 (1965)	15
James v. United States, 542 F.2d 16 (6th Cir. 1976), *cert. denied* 429 U.S. 1093 (1977)	11, 12
Massachusetts Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479 (1976)	8
Phillips v. Commissioner, 283 U.S. 589 (1931)	8, 9, 10
Schildcrout v. McKeever, 580 F.2d 994 (9th Cir. 1978)	11, 12

MISCELLANEOUS

H. R. Rep. No. 94-658, 94th Cong., 2d Sess., pp. 439-444 (1976)	16, 17
"Special Study Of The Use By The Internal Revenue Service Of Third Party Returns and Return Information," *The Tax Lawyer*, Vol. 33, No. 3, p. 717 (Spring 1980)	14, 17

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KEMLON PRODUCTS AND DEVELOPMENT COMPANY, KEYSTONE ENGINEERING COMPANY, SANDIFORD AND MARGARET RING, RUSSELL K. AND EVA M. RING, WILLIAM S. RING, JOHN H. AND J. GAIDEN RING,
Petitioners

v.

THE UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, ROBERT M. MCKEEVER, DISTRICT DIRECTOR OF THE AUSTIN DISTRICT, GARY D. BROWN, INTERNAL REVENUE AGENT, ROBERT ELIASON, INTERNAL REVENUE AGENT,
Respondents

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States

Court of Appeals for the Fifth Circuit entered in this proceeding on March 12, 1981, and its judgment on rehearing entered on May 29, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 638 F.2d 1315, appears in the Appendix at p. A-1. The opinion of the Court of Appeals denying rehearing en banc and granting, in part, a panel rehearing, reported at 646 F.2d 223, appears in the Appendix at p. A-19. The May 22, 1978, "Order" of the United States District Court for the Southern District of Texas (Houston Division), not reported, appears in the Appendix at p. A-22. The District Court's "Findings of Fact and Conclusions of Law", reported at 79-2 U.S.T.C. ¶ 9512, appears in the Appendix at p. A-28. The District Court's "Final Judgment", unreported, appears in the Appendix at p. A-33.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on March 12, 1981, and rendered its judgment denying petitioner's motion for rehearing en banc and granting, in part, petitioner's motion for a panel rehearing on May 29, 1981. Petitioners invoke this Court's jurisdiction under 28 U.S.C.A. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amed. IV	See Appendix at p. A-49.
U.S. Const. Amend. V	See Appendix at p. A-49.

Internal Revenue Code of 1954, as amended (26 U.S.C.A.):

Sec. 6103(a)	See Appendix at p. A-49.
Sec. 6103(b)	See Appendix at p. A-49.
Sec. 6103(k)(6)	See Appendix at p. A-53.
Sec. 6861	See Appendix at p. A-53.
Sec. 6863	See Appendix at p. A-56.
Sec. 7217	See Appendix at p. A-59.
Sec. 7421(a)	See Appendix at p. A-60.
Sec. 7429	See Appendix at p. A-60.

STATEMENT OF THE CASE

Petitioners Kemlon Products and Development Company and Keystone Engineering Company are engaged in the business of research, development, manufacturing and sale of certain patented products for use in the drilling of deep-bore oil and gas wells and in geophysical evaluation of subsurface energy reserves. The individual petitioners (husbands) in this case are the stockholders and officers of the corporate petitioners.

Petitioner Kemlon's research and development activities also include its work performed pursuant to a joint manufacturing and confidentiality agreement with one of its largest customers. Such agreement prevents Kemlon from obtaining any new patents as a result of such research and obligates Kemlon not to disclose such research to anyone else, including other customers.

In December, 1976, the Internal Revenue Service initiated an audit examination of Kemlon's and Keystone's tax returns for the fiscal year ending September 30, 1975, and of the individual petitioners' tax returns for the calendar year ending December 31, 1975. In the

course of examining such tax returns, Respondent IRS Agent Gary D. Brown was assigned the task of determining whether or not Kemlon's claimed $1,000,000 depreciable basis in its U.S. Patents 3793608 and 3898731 was reasonable. Kemlon had purchased said patents from two of its shareholders, Sandiford and Russell K. Ring, at the agreed value of $1,000,000. Sandiford and Russell K. Ring were the named inventors in the Letters Patent for said patents.

It is undisputed that during the audit examination, petitioners provided the IRS with all information it requested in connection with the audit examination, including all information requested concerning the patents and the patented product. More, specifically, Kemlon provided Agent Brown with confidential information which was the subject of the above mentioned joint manufacturing and confidentiality agreement as it related to the patents and the patented product. Court of Appeals Opinion at A-6, Footnote 6, paragraph (H).

Despite such cooperation, Agent Brown determined he would need to contact Kemlon's customers concerning his evaluation of the patents and informed Kemlon's counsel that he intended to contact Kemlon's customers and elicit information concerning the patented product, their use of the product and their dealings with Kemlon. Agent Brown refused to inform Kemlon's counsel of the specific information he desired to obtain from the customers and refused to allow Kemlon's counsel to act as an intermediary in obtaining such information.

Agent Brown's impending contact of the customers and petitioners' fear that he would disclose valuable confidential information to such customers in the process of

obtaining the unknown information caused petitioners to file the instant suit, seeking to enjoin respondents from disclosing directly or indirectly "return information" in violation of (i) 26 U.S.C.A. Sec. 6103(k)(6), (ii) the Privacy Act of 1974, 5 U.S.C.A. Sec. 552a(b), and (iii) Kemlon's constitutional right to privacy. The district court's jurisdiction was invoked under 28 U.S.C.A. Sec. 1340.

On May 22, 1978, the district court entered an "Order" which (1) ordered respondents to provide petitioners with a list of questions Agent Brown desired to ask of the customers within ten (10) days, (2) ordered petitioners to address the substantive issues under 26 U.S.C.A. Sec. 6103(k)(6) of whether the information sought was "necessary" and whether such information was "otherwise reasonably available" within twenty (20) days of the receipt of respondents' proposed questions, and (3) ordered petitioners not to contact their customers with regard to respondents' proposed questions. Order of District Court, at A-27.

The district courts' May 22, 1978, order also held that petitioners' injunction action was within the Anti-Injunction Act, 26 U.S.C.A. Sec. 7421(a). However, said order by the district court also recognized the judicially created exception to the Anti-Injunction Act in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), and under the authority of *Commissioner v. Shapiro*, 424 U.S. 614 (1876), held that petitioners were entitled to an adequate opportunity of showing respondents could not ultimately prevail on the Section 6103 (k)(6) claim. Therein was the district court's rationale for ordering respondents to provide petitioners with a list of proposed questions desired to be asked of the

customers. In other words, petitioners would only then have an adequate opportunity to address the substantive issues under Section 6103(k)(6) of whether the information sought was "necessary" or "otherwise reasonably available" and thereby have an opportunity of meeting their burden under the third criterion of the *Enochs* exception, i.e., of proving respondents could not ultimately prevail on the merits. *Id.* at A-25.

Respondents absolutely refused to comply with the district court's May 22, 1978, order, and contended in a motion for reconsideration that the *Shapiro* case did not provide the district court with jurisdiction to order respondents to provide petitioners with the list of questions. Court of Appeals opinion at A-8. In the event their motion for reconsideration would not be granted, respondents requested the injunction be issued, as requested by petitioners, in order that they could appeal the issue of whether the *Shapiro* case gave the district court such jurisdiction.

The district court, at this point in time, granted neither request by respondents, and ordered a show cause hearing for September 8, 1978. At such hearing, the respondents' trial counsel (1) again requested the court to issue the injunction so that an appeal could be taken (Supp. Record on Appeal, p. 41), (2) stated that ". . . to the extent there could be any harm, that harm could be repaired by the adequate remedy of law available . . ." (Supp. Record on Appeal, p. 44), and (3) expressly admitted to the district court respondents were not contesting the issue or irreparable harm (Supp. Record on Appeal, p. 46).

On December 28, 1978, the district court entered its final judgment granting the injunction against respond-

ents. On March 27, 1979, the district court filed its findings of fact and conclusions of law which, basically, held (1) respondents waived the issue of irreparable harm, (2) petitioners' remedy at law under 26 U.S.C.A. Sec. 7217 was inadequate, (3) the *Shapiro* case gave the district court jurisdiction for its May 22, 1978 order, and (4) the injunction was a proper sanction for respondents' refusal to obey the district court's May 22, 1978 order. Findings of fact and conclusions of law at A-28.

The Fifth Circuit's March 12, 1981, decision reversed the injunction granted by the district court and (1) held respondents did not waive the issue of irreparable harm and petitioners had not proven irreparable harm, (2) held that even if irreparable harm had been established, respondents did all they were required to do under the *Shapiro* case, i.e., respondents merely established the possibility that they might prevail on the Section 6103 (k)(6) claim, (3) stated that it expressed no opinion on the adequacy of the petitioners' remedy at law under 26 U.S.C.A. Sec. 7217, and (4) refused to rule on petitioners' claims that respondents' proposed action would violate their constitutionally guaranteed right to privacy and the Privacy Act of 1974 because petitioners did not cross-appeal the district court's rulings against such claims. Fifth Circuit Opinion at A-1.

The Fifth Circuit's opinion on rehearing denied petitioners' motion for rehearing en banc and granted, in part, petitioners motion for a panel rehearing. In granting, in part, petitioners' motion for a panel rehearing, the Fifth Circuit withdrew footnote 8 of its original opinion. In such footnote, the Fifth Circuit had erroneously held petitioners were not entitled to raise on appeal their con-

stitutional right to privacy argument because they had not cross-appealed the district court's ruling against such argument. Petitioners had pointed out in their motions for rehearing that such holding was in conflict with *Massachusetts Mut. Life Ins. Co. v. Ludwig,* 426 U.S. 479 (1976). However, as will be demonstrated below, petitioners contend the Fifth Circuit again erroneously dismissed their constitutional argument in its opinion on rehearing. Opinion on rehearing at A-19.

The Fifth Circuit's opinion on rehearing also refused to grant petitioners' motion to supplement the record on appeal with certain items of record in the related and pending refund litigation between the same parties. (Civil Action No. H-79-782), Southern District of Texas). Primarily, petitioners desired the Fifth Circuit to supplement the record on appeal with a February 24, 1981, order of the district court in the related refund litigation, which held Agent Brown in civil contempt of court for, among other reasons, making a false statement in the affidavit he had submitted to the district court in the injunction suit proceedings. Such false statement was that he had not yet contacted any business customers of petitioners. Said order of the district court in the related and pending refund suit is included in the Appendix at A-36.

REASONS FOR GRANTING THE WRIT

1. The decision of the Fifth Circuit conflicts with applicable decisions of the U.S. Supreme Court.

The Fifth Circuit's decision in this case is clearly in conflict with this Honorable Court's decisions in *Commissioner v. Shapiro,* 424 U.S. 614 (1976) and *Phillips v. Commissioner,* 283 U.S. 589 (1931).

The Fifth Circuit's decision was primarily based on the holding in *Shapiro* that the government "is required simply to litigate whether its assessment [proposed action] has a basis in fact", i.e., the government is required to come forward with the basic facts from which it appears it may prevail. 424 U.S. at 629. Such holding (commonly called the "*Shapiro* requirement") was for the purpose of giving taxpayers a fair opportunity of meeting their burden under *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), i.e., of establishing that under no circumstances could the government ultimately prevail on the merits.

The Fifth Circuit's decision held respondents did all they were required to do under *Shapiro*, i.e., they established the mere "possibility" that they would prevail on the merits of the Section 6103(k)(6) claim via an affidavit submitted by Agent Brown.

However, a full reading of the opinion in *Shapiro* makes it clear that allowing the government to defeat an injunction suit upon the mere showing that it "possibly" could prevail on the merits, is only proper when there is an opportunity for an adequate ultimate judicial determination on the merits. In discussing the Supreme Court's prior decision in *Phillips v. Commissioner*, 283 U.S. 589 (1931), the Court in *Shapiro* stated the following:

> It is true that in *Phillips v. Commissioner*, 283 U.S. 589, 75 L.Ed. 1289, 51 S.Ct. 608 (1931), this Court sustained against constitutional challenge the statutory scheme created by Congress for the litigation of tax disputes and in so doing referred both to the jeopardy assessment provisions and the Anti-Injunction Act, id., at 596 n. 6, L.Ed. 1289, 51 S.Ct. 608. However, the *Phillips* case itself did not involve a

jeopardy assessment and the taxpayer's assets could not have been taken or frozen in that case *until he had either had, or waived his right to, a full and final adjudication of his tax liability before the Tax Court* (then the Board of Tax Appeals.) The taxpayer's claim in that case was simply that a statutory scheme which would permit the tax to be assessed and collected prior to any judicial determination of his liability—by way of a refund suit or review of the Board of Tax Appeals' decision—was unconstitutional. Thus, insofar as *Phillips* may be said to have sustained the constitutionality of the Anti-Injunction Act, as applied to a jeopardy assessment and consequent levy on a taxpayer's assets without prompt opportunity for final resolution of the question of his liability by the Tax Court, it did so only by way of dicta. The dicta were carefully expressed. The Court said:

"Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained."

"Where *only property rights* are involved, mere postponement of the judicial enquiry is not a denial of due process, *if the opportunity given for the ultimate judicial determination of the liability is adequate* . . ." *Id.*, at 595, 596-597. (Emphasis supplied.)

Accordingly, neither the holding nor the dicta in *Phillips* support the proposition that the tax collector may constitutionally seize a taxpayer's assets without showing some basis for the seizure under circumstances in which the seizure will injure the taxpayer *in a way that cannot be adequately remedied by a Tax Court judgment in his favor.* Instead it would appear to be entirely consistent with our more recent holdings. 424 U.S., at pp. 631-632. (Emphasis supplied.)

Petitioners contend the above discussion by the Court in *Shapiro* means that while the government's burden is less in providing a taxpayer with "procedural due process", the taxpayer is further entitled to "substantive due process" on the full merits. If the taxpayer's opportunity for such "substantive due process" is inadequate, then merely allowing the government to proceed only upon meeting the less burdensome requirements of "procedural due process" is clearly a denial of the taxpayer's due process rights.

The Fifth Circuit's decision in this case allows the total evisceration of petitioners constitutionally guaranteed right to privacy only upon the government's meeting of the less burdensome requirements of "procedural due process." By refusing to express an opinion on the adequacy of the taxpayers' remedy at law under Section 7217, the Fifth Circuit ignored the fact that Section 7217, or any other provision, does not preserve a taxpayer's right to privacy and confidentiality pending an adjudication on the full merits. Section 7217 merely entitles a taxpayer to recover civil damages in the event there is a violation of the confidentiality rule of Section 6103. As a result, petitioners have been denied their right to "substantive due process" for the protection of their constitutionally guaranteed right to privacy. *Fuentes v. Shevin,* 407 U.S. 67 (1962), held that "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." 407 U.S. at 82.

The Fifth Circuit's reliance upon *Schildcrout v. McKeever,* 580 F.2d 994 (9th Cir. 1978) and *James v. United States,* 542 F.2d 16 (6th Cir. 1976), *cert. denied* 429 U.S. 1093 (1977), the only two circuit court cases applying *Shapiro,* also demonstrates the error in not allowing petitioners an adjudication on the full merits. *Schildcrout, James,* and *Shapiro,* as with most jeopardy

assessment cases, only dealt with property rights. Both *Schildcrout* and *James* involved unsuccessful attempts by taxpayers to enjoin th. IRS from making a jeopardy assessment of property. The respective courts held that the government met the *"Shapiro* requirement" and that the property could be seized pursuant to 26 U.S.C.A. § 6861. However, pursuant to 26 U.S.C.A. § 6863(b)(3) and/or (c), the government was prohibited from selling the seized property until the taxpayers exercised [or failed to timely exercise] their rights to an adjudication on the full merits in the U.S. Tax Court or a federal district court. Section 6863(b)(3) provides for a stay of the sale of property seized pursuant to a jeopardy assessment until the U.S. Tax Court's adjudication on the full merits is final. If the taxpayer elects a review on the merits in federal district court pursuant to 26 U.S.C.A. § 7429, the sale of the seized property is stayed by Section 6863 (c) until such decision is final.

There is no parallel statutory requirement that preserves a taxpayer's right to privacy and confidentiality pending an adjudication on the full merits as Section 6863 preserves a taxpayer's property rights pending such an adjudication. This is precisely why Section 7217 is an inadequate remedy at law and why the Fifth Circuit's decision in this case is clearly erroneous. In other words, Section 6863 provides "substantive due process" with regard to property rights, but Section 7217, or any other provision, does not provide "substantive due process" with regard to privacy rights.

The holding in *Shapiro* also included a provision that "a mere good faith allegation of an unpaid tax" is not a sufficient meeting by the government of the requirement that it "simply litigate whether its assessment [proposed action] has a basis in fact." 424 U.S. at 629. The Fifth

Circuit's decision that respondents had met such requirement was based on an affidavit by Agent Brown in which he simply stated he needed to ask the customers certain undisclosed questions. Fifth Circuit opinion at A-6. However, said affidavit was the same affidavit in which Agent Brown was held to have made false statements and for which he was held in civil contempt of court. Agent Brown was also held to have made false statements in a subsequent affidavit and in his court ordered deposition. Petitioners, therefore, contend respondents' proof did not even rise to the integrity of a "good faith allegation of an unpaid tax" and, also, therefore, petitioners contend respondents failed to litigate whether their proposed action had a basis in fact as required by *Shapiro*. Order of district court at A-38.

Petitioners also contend the Fifth Circuit is in error in not considering their constitutional argument. First, the Fifth Circuit's decision was based on the holding in *Shapiro*, but inconsistently ignored the "substantive due process" requirement also explained in *Shapiro*. Second, the Fifth Circuit's opinion on rehearing is incorrect wherein it states petitioners did not address the merits of such constitutional argument in its brief to the Fifth Circuit. To the contrary, petitioners contend their brief to the Fifth Circuit (pp. 31-43) explicitly raised and discussed the due process requirement of *Shapiro*.

2. The Fifth Circuit's decision also raises an important question of federal law which has not been, but should be, settled by the U.S. Supreme Court.

The Tax Section of the American Bar Association has recognized the insufficiency of the statutory framework

in providing a taxpayer with due process in relation to his right to privacy. The Tax Section's "Special committee On Confidentiality Of Tax Returns" prepared a "Special Study of the Use by the Internal Revenue Service of Third Party Returns and Return Information", *The Tax Lawyer*, Vol. 33, No. 3, p. 717 (Spring 1980). At pages 722-723 thereof, said study contains the following comments:

> The taxpayer under investigation also has his own privacy interest. He may not want to disclose that he is being audited with respect to a particular issue. The protection drawn for his due process interest should recognize this privacy interest to the extent possible. The taxpayer is in the best position to balance, as necessary, his privacy interest against his own due process interest . . .
>
> *The due process interest of the taxpayer under investigation was not noted by Congress in its discussion of Section 6103,* but this interest should be considered as important as the privacy interest of the third party with which Congress was explicitly concerned . . . (Emphasis Added.)

The privacy interest of a taxpayer under investigation should also be considered as important as his property interest. In both jeopardy and non-jeopardy assessment cases, the legislative scheme of the Internal Revenue Code always preserves a taxpayer's property rights until a final adjudication on the full merits via a refund suit or a proceeding in the U.S. Tax Court. There is, therefore, no justification for a taxpayer's privacy rights, especially in a non-jeopardy assessment situation as is this case, not to be totally preserved until a full decision on the merits. Just allowing the government to totally eviscerate

such rights upon a mere showing that it could "possibly" be correct in doing so, is clearly unconstitutional.

In addition to the statutory right to confidentiality under Section 6103, the corporate and individual petitioners in this case do in fact have constitutionally guaranteed rights to privacy under the Fourth Amendment to the U.S. Constitution. *G. M. Leasing Corp. v. U.S.*, 429 U.S. 338 (1977) and *Griswold v. Connecticut*, 381 U.S. 479 (1965). Petitioners' argument in this regard is that such constitutionally guaranteed right to privacy should and is required to be protected under the due process clause of the Fifth Amendment to the U.S. Constitution, as are other constitutionally guaranteed rights. As demonstrated above, petitioners contend the Fifth Circuit's decision in this case erroneously does not allow such adequate due process protection of their right to privacy.

A subsidiary issue that needs to be addressed at this point is whether a taxpayer's confidentiality rights under Section 6103 are the equivalent of his constitutionally guaranteed privacy rights. Common sense dictates that such rights are equivalent and, in fact, are one in the same. The above described study by the Tax Section of the A.B.A. certainly recognizes such an equivalency. The broad definition of "return information" in Section 6103 (b) certainly can leave no doubt as to such equivalency. Finally, the landmark decision in *G. M. Leasing Corp. v. U.S.*, 429 U.S. 338 (1978), clearly demonstrates such equivalency. *G. M. Leasing Corp.* held that a warrantless seizure of a corporation's books and records violated the corporation's 4th Amendment right to privacy. Books and records of a taxpayer are clearly included in the definition of "return information" in Section 6103(b). *G. M. Leas-*

ing Corp., however, did not involve a desire by the IRS to disclose such "return information" to the taxpayer's customers as does this case. There can, therefore, be no doubt that a taxpayer's confidentiality rights under Section 6103 are the equivalent of his constitutionally guaranteed privacy rights.

Therefore, because of the hiatus in the statutory scheme of not providing for "substantive due process" protection of taxpayers' rights to confidentiality and privacy, this case represents an important question of federal law which has not been, but should be, settled by this Honorable Court.

CONCLUSION

Section 6103 was added to the Internal Revenue Code in Subpart F, entitled "Procedure and Administration", by Section 1202 of the Tax Reform Act of 1976, P.L. 94-455, 90 Stat. 1520. In discussing the reasons for passage of the administrative provisions of the Tax Reform Act of 1976, Congressman Charles A. Vanick stated:

> . . . Several of these provisions furnish the taxpayer with important new protections against the arbitrary power of the I.R.S. These sections are important additions to the liberties of citizens and serve as safeguards against improper actions by the Internal Revenue Service. . . . The Internal Revenue Service is an outstanding agency, probably one of the most efficient bureaucracies anywhere in the world. It is also one of the most powerful—its nearly unlimited power can lead to abuses, abuses for which the citizen has little or no remedy. . . .
>
> . . . As representatives of the American public, we must begin to watch with the utmost of care, how

> the I.R.S. exercises its enormous powers. See H.R. Rep. No. 94-658, 94th Congress, 2d Session, Page 439-444 (1976).

As the A.B.A.'s Tax Section study pointed out, Congress did not explicitly address the taxpayer's due process interest in relation to his privacy rights. However, Congressman Vanick's above statement that the "utmost of care" should be used in watching how the I.R.S. exercises its enormous powers, would certainly be consistent in allowing petitioners in this case an adjudication on the full merits of the I.R.S.'s desire to contact their business customers. Petitioners contend, as explained above, that the U.S. Constitution requires such an adjudication on the full merits.

The instant case bears a partial analogy to the recent decision by Mr. Justice Rehnquist in *Becker v. U.S.*, 81-1 U.S.T.C. ¶ 9465. In *Becker*, Justice Rehnquist stayed a district court order that required the taxpayers to turn over to the IRS videotapes that were both evidence of tax liability and property used for production of income. The instant case also involves assets of a taxpayer (confidential information) which are both evidence of tax liability and property used for production of income. However, in the instant case, the IRS desires to go one step further than it did in *Becker*, i.e., it desires to disclose such information to petitioners' customers. Such action, if allowed to take place, will be the equivalent of allowing petitioners' assets to be seized and sold without an adjudication on the merits.

Finally, petitioners contend that allowing the I.R.S. to violate a taxpayer's privacy rights only upon a mere showing that is "possibly" correct in doing so, will render

the confidentiality rule of Section 6103 totally ineffective. There is almost no audit situation in which the IRS could not swear in an affidavit that it needed to contact a third party for verification purposes. If the taxpayer is not allowed to prove that he can provide such verification in probative form, the confidentiality rule is again totally useless. Congress could not possibly have intended this result. Petitioners contend the Fifth Circuit's decision in this case allows such an erroneous result and, if allowed to stand, will serve to undermine the "voluntary self-assessment" tax system of the United States. It was within this system and in a spirit of cooperation that petitioners voluntarily turned over their confidential information. To allow the IRS to disclose such information to petitioners' business customers without a final adjudication on the full merits will constitute a travesty of justice.

Respectfully submitted,

EDWARD D. URQUHART
SPONSEL, URQUHART & ROSS
Attorneys at Law
50 Briar Hollow Lane
Suite 320 West
Houston, Texas 77027
713/840-0920

Attorney for Petitioners

APPENDIX

KEMLON PRODUCTS AND DEVELOPMENT COMPANY et al.,
Plaintiffs-Appellees,

v.

UNITED STATES of America et al.,
Defendants-Appellants.

No. 79-1452.

United States Court of Appeals,
Fifth Circuit

March 12, 1981.

United States, Internal Revenue Service and several officers thereof appealed order of United States District Court for the Southern District of Texas, John V. Singleton, Jr., J., permanently enjoining them from disclosing tax return information to any of plaintiff taxpayers' business customers. The Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that: (1) suit was within scope of Anti-Injunction Act; (2) conclusory allegations that disclosure that taxpayer was under audit would cause it to lose customers because of concern for its financial stability was insufficient to demonstrate irreparable harm; and (3) even if taxpayer proved irreparable harm under *Enochs*, Government satisfied *Shapiro* as it appeared that the Government would prevail on claim that there would be no violation of disclosure statute as regards questions to be asked of customers to determine value and life of taxpayers' patents for purpose of depreciation allowance.

Reversed.

Appeal from the United States District Court for the Southern District of Texas.

Before HILL, RUBIN and ANDERSON, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

The appellants, the United States, the Internal Revenue Service, and several officers of the Service, appeal an order permanently enjoining them from disclosing return information of appellee, Kemlon Products and Development Company ("Kemlon"), to any of Kemlon's business customers. Appellants maintain that the injunction falls within the scope of the Internal Revenue Code's Anti-Injunction Act, 26 U.S.C.A. § 7421(a) (West Supp. 1980),[1] and that none of the judicially created exceptions to this Act applies. Since we find inadequate proof of irreparable harm and sufficient facts to show the government has a chance to prevail on its right to disclose such information, we agree with appellants that the case fits within none of the exceptions to the Anti-Injunction Act. We reverse the district court's decision.

FACTS

The facts as pleaded and developed through affidavits disclose the following story.

---

1. The Anti-Injunction Act, 26 U.S.C.A. § 7421(a) (West Supp. 1980), reads in full:

> Tax. Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

Kemlon and Keystone Engineering Company ("Keystone") are engaged in the research, development, manufacturing, and sale of certain patented products for use in the oil and gas industry. Kemlon and Keystone are related by common ownership and the stock of these corporations is held by Sandiford Ring, Russell R. Ring, William S. Ring, and John H. Ring.[2] All of the foregoing were plaintiffs below, and are appellees here.

In December, 1976, the Internal Revenue Service initiated an audit of Kemlon's and Keystone's tax returns for the fiscal year ending September 30, 1975, and of the individuals' tax returns for the calendar year ending December 31, 1975. In the course of examining Kemlon's tax returns, the Service questioned the accuracy of the valuation of certain patents held by Kemlon.[3] In particular, the Service questioned whether a portion of the value which Kemlon assigned to the patent should have been allocated to assets other than the patent, such as goodwill. It was also concerned about the useful life of the patent. The Service was concerned that Kemlon had valued the patents too highly and had thereby obtained a larger depreciation deduction than was properly allowable. It is undisputed that during the audit, Kemlon has provided the Service with all the information it has requested concerning the patents and the patented product.

Despite Kemlon's cooperation, Engineering Agent Gary D. Brown, who was the Service's agent in charge of valuing the patents, determined that it would be necessary

---

2. The wives of Sandiford Ring, Russell K. Ring, and John H. Ring are parties to this action only by virtue of having filed joint income tax returns with their respective husbands.

3. The patents are incorporated into a single patented product, a ceramic electrical connector.

to contact customers of Kemlon. When counsel for Kemlon was informed by Agent Brown that he intended to contact Kemlon's customers and elicit information concerning the product, their use of the product and their dealings with Kemlon, Kemlon's counsel objected on grounds that any such contact would disrupt the confidential business relationship between Kemlon and its customers and would constitute unauthorized disclosure of tax return information in violation of 26 U.S.C.A. § 6103(k)(6) (West Supp. 1980).[4] Kemlon's counsel offered to secure information from third parties or, alternatively, to arrange a meeting with customers if Agent Brown would furnish in advance the questions to be asked. Agent Brown declined to accept the suggestions of Kemlon's attorney.

After further consultation by Agent Brown with other officials in the Service, it was determined that the valuation of Kemlon's patents required that Agent Brown contact Kemlon's major customer. The Acting District Disclosure Officer notified Agent Brown that such a contact would not violate § 6103. Agent Brown thereafter contacted Kemlon and offered it the opportunity to arrange a meeting with its major customer and to be

4. 26 U.S.C.A. § 6103(k)(6) (West Supp. 1980) reads in full:
Disclosure by internal revenue officers and employees for investigative purposes.—An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosure shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

present at the meeting. Agent Brown continued to refuse to provide Kemlon with a list of questions to be asked or to have Kemlon act as intermediary.

Kemlon and the other appellees at this time filed the instant suit, seeking to enjoin Agent Brown and the Service from disclosing directly or indirectly Kemlon's return information to Kemlon's customers.[5] Kemlon claimed that such an injunction did not come within the scope of the Anti-Injunction Act and that diclosure of the return information would violate (i) § 6103(k)(6) of the Internal Revenue Code, (ii) the Privacy Act of 1974, 5 U.S.C.A. § 552a(b) (West 1977), and (iii) Kemlon's constituitonal right to privacy. Kemlon alleged that the Service intended to contact its largest customer concerning the patents in question. In its pleading that such a contact would cause substantial and irreparable harm for which no adequate remedy existed at law, Kemlon alleged that its industry was highly competitive and that its largest customers are interested in doing business with technological and research-oriented companies which are considered financially stable. Kemlon alleged that disclosure of return information would result in a loss of business reputation and the opportunity for Kemlon to work on new and other patentable products.

In support of its allegation of irreparable harm, Kemlon submitted the affidavit of John H. Ring repeating the allegations of the complaint and containing an additional assertion that irreparable harm would result because Kemlon's customers are interested only in research companies stable in the areas of acquiring raw materials

5. In the alternative, Kemlon sought damages pursuant to 26 U.S.C.A. § 7217 (West Supp. 1980).

for inventory, the manufacturing process, the quality control process, and the distribution process. Ring's affidavit elaborated no further as to how irreparable harm would be suffered.

The Service submitted a motion to dismiss Kemlon's suit on grounds that it was barred by the Anti-Injunction Act. Attached to this motion was an affidavit by Agent Brown describing in very general terms the questions he wished to ask of Kemlon's customer.[6] Agent Brown also

---

6. The questions, as generally described by Agent Brown, are:
(A) Has the customer ever produced a certain type of product;
(B) Whether the customer holds any patents on these products and if so, whether royalties are paid and the amount of royalties;
(C) The history of the customer's dealings with Kemlon;
(D) Whether the customer has knowledge of a certain type of product being sold on the open market with a certain type of rating;
(E) Whether any corporations or entities related to the customer resell or manufacture a certain type of product;
(F) Whether the customer purchases a certain product from Kemlon by virtue of a particular fact or would the customer purchase this product if a certain feature were absent;
(G) The customer's views as to whether the patented product is superior to another type of product produced by Kemlon and the reasons therefor;
(H) Various questions dealing with a specific agreement between Kemlon and the customer;
(I) Various technical questions relating to a product used by the customer;
(J) Verification of certain specifications for a particular product;
(K) Experience which the customer has had in using a particular product;
(L) Views of the customer towards Kemlon's abilities, technical knowledge, and quality control;
(M) Various aspects of the customer's dealings with Kemlon; and
(N) Views of the customer toward potential market developments and changes relating to a certain product.
Agent Brown did not name or describe the product in his affidavit because at the time the motion to dismiss was filed, Kemlon had not identified the product in its pleadings and the Service was reluctant to disclose the product in light of the nature of Kemlon's complaint.

gave reasons as to why the Service was opposed to giving the specific questions first to Kemlon.[7] After a hearing on this motion on March 20, 1978, the district court entered an order dated May 22, 1978, in which it rejected Kemlon's claim that the disclosure was barred by the Privacy Act of 1974 and the United States Constitution. The district court further held that the requested injunction was within scope of the Anti-Injunction Act, but was concerned that the judicial exception to this Act established by *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962),

---

7. The reasons given by Agent Brown are:
(A) [A]ffiant [Brown] believes that Kemlon and the customer in question should not have an opportunity to collaborate on the responses that should be made to the specific inquiries; in this regard, a potential issue in the patent valuation is whether or not a portion of Kemlon's income should be allocated to assets other than the patent, such as goodwill; some of the quesitons seek to inquire as to whether or not there is any element of goodwill existing between Kemlon and the customer; in the substantiation of the patent valuation provided to affiant by Mr. Urquart [Kemlon's attorney], there does not appear to be any allocation of income to an element of goodwill or other assets of Kemlon, or to other products sold by Kemlon;
(B) [A]ffiant believes that to properly arrive at a fair market value of the patent, in this case, the underlying information sought from the customer and other third parties for that matter needs to be independently obtained, verified and confirmed without Kemlon's intervention;
(C) [O]bviously, some of the information would only be within the knowledge of the customer; because of the particular circumstances in this case, affiant believes that direct contact with the third party would be the appropriate manner to secure the information so that Kemlon would not have an opportunity to influence or suggest responses to questions; and
(D) [A]nswers which the customer may make to certain questions could prompt further questions; if Kemlon obtains written responses to questions proposed by affiant, then affiant may have to ask Kemlon to submit further questions to the customer which may or may not be resisted by Kemlon; in short, this procedure is somewhat cumbersome to all parties.

was applicable. The district court noted that Kemlon had made a "substantial claim of irreparable injury" and had been unable to address adequately whether the Service would prevail on the § 6103(k)(6) claim because of the Service's refusal to disclose the specific questions it wished to ask Kemlon's customer. Rather than rule at that time on the motion to dismiss, the court on the basis of *Commissioner of Internal Revenue v. Shapiro*, 424 U.S. 614, 96 S.Ct. 1062, 47 L.Ed.2d 278 (1976), ordered the Service to submit to Kemlon questions to be asked of its customer in order that Kemlon could have an opportunity under *Enochs* to prove that it would prevail on its § 6103 claim.

The Service thereupon filed a motion requesting the district court to reconsider its May 22 order. The Service maintained that *Shapiro* was not applicable because Kemlon had not pleaded or proved facts establishing it would suffer irreparable harm through the contact with its customer. The Service argued in the alternative that if the district court believed *Shapiro* was applicable, Agent Brown's affidavit describing generally the questions to be asked provided sufficient information to show that the *Enochs* exception did not apply. In the event the district court should refuse to grant the motion to reconsider its May 22 order, the Service requested that the May 22 order be certified for appeal under 28 U.S.C.A. § 1292 (b), or, alternatively, that the district court issue an injunction on the basis of the record as it then stood.

On September 8, 1978, a hearing was held with respect to the May 22 order. No new arguments were brought forth at that time although the Service submitted to the district court, sealed for *in camera* inspection, the specific questions it proposed to ask Kemlon's customer. On De-

cember 28, 1978, the district court entered final judgment denying the Service's motion to reconsider its May 22 order and issuing an injunction barring the Service from disclosing return information to Kemlon's business customers. The Service timely appealed this order.[8]

On March 27, 1979, the district court entered Findings of Fact and Conclusions of Law. The district court found that the Service offered no evidence to controvert Kemlon's claims of irreparable injury for which there was no adequate remedy at law. Accordingly, the court found such irreparable injury to obtain. The district court further found that the Service refused to provide Kemlon with the specific questions to be asked of its customer, and that the appropriate sanction under *Shapiro* for such refusal was the issuance of the injunction.[9]

APPLICABILITY OF ANTI-INJUNCTION ACT

[1]Kemlon asserts without reference to authority that this suit to prevent alleged unnecessary disclosure of

---

8. Kemlon has not cross-appealed the district court's ruling that disclosure of the return information is not barred by the Privacy Act of 1974 or the United States Constitution.

9. The parties' briefs inform this court that the Service has since determined Kemlon's patents to be of no value and accordingly disallowed Kemlon's depreciable basis in the patents and its depreciation deduction. Kemlon paid a portion of the taxes assessed and filed a claim for a refund. After a denial of the refund claim, Kemlon brought suit in federal district court for a refund of the taxes paid, for damages, and for attorney's fees resulting from the Service's actions. The Service argues that to defend this refund suit it will be necessary to contact Kemlon's business customers for depositions. Because the injunction is broad in scope and prohibits all contacts by the Service with Kemlon's customers, this appeal is not moot. Kemlon does not argue otherwise.

We express no opinion with respect to the propriety of the Service's action in holding the patents to be of no value after the district court's judgment.

return information in violation of § 6103(k)(6) is not within the scope of the Anti-Injunction Act. The object and purpose of this suit, Kemlon maintains, is not to restrain "the assessment or collection" of taxes but is to prevent disclosure of information. The district court did not accept this argument, nor do we. Section 6103 is not one of the code sections expressly exempted from the Anti-Injunction Act. Nor do we believe the Anti-Injunction Act must be read as literally as Kemlon would read it. The policy behind this statute is "to [protect] the government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement interference. . . ." *Bob Jones University v. Simon,* 416 U.S. 725, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974). We agree with the Seventh Circuit that "this ban against judicial interference is applicable not only to the assessment or collection itself, but is equally applicable to activities which are intended to or may culminate in the assessment or collection of taxes." *United States v. Dema,* 544 F.2d 1373, 1376 (7th Cir. 1976), *cert. denied* 429 U.S. 1093, 97 S.Ct. 1106, 51 L.Ed.2d 539 (1977). This rule is reflected in the holdings of several circuit cases which have dealt with the information gathering process of the Service. *United States v. Dema, supra,* (holding that an injunction retraining the Service from issuing subpoenas for taxpayer's books violates the Anti-Injunction Act); *Campbell v. Guetersloh,* 287 F.2d 878 (5th Cir. 1961) (holding that an injunction barring the Service from utilizing the bank deposit and expenditure method of recomputing income violates the Act); *Koin v. Coyle,* 402 F.2d 468 (7th Cir. 1968) (holding that an injunction restraining the Service from using certain evidence is barred by the Act); *Lewis v. Sandler,* 498 F.2d 395 (4th Cir. 1974) (injunction preventing police from fur-

nishing to the Service information about persons suspected of selling narcotics is in the violation of the Act).

Recently, in a different context, the Supreme Court rejected the taxpayer's assertion that an injunction would lie because the injunction would not directly prevent the assessment and collection of taxes. In *Bob Jones University v. Simon,* 416 U.S. 725, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974), the Court held that the Act prevented a court from enjoining the Service where the Service had revoked a letter ruling of tax exempt status. The Court held, *inter alia,* that the Service's action would require the taxpayer to pay FICA and FUTA taxes and would increase donors' tax liability because their contributions would no longer be deductible. Thus, the Court reasoned, permitting the injunction would restrain the collection of these taxes. 416 U.S. at 738-742, 94 S.Ct. at 2046-2048. *Accord Alexander v. "Americans United,"* 416 U.S. 752, 94 S.Ct. 2053, 40 L.Ed.2d 518 (1974).

[2] We believe the foregoing cases indicate that the instant injunction is well within the scope of the Anti-Injunction Act. We now turn to whether the exception to the Anti-Injunction Act applies.

JUDICIAL ECEPTION TO ANTI-INJUNCTION ACT

[3] In *Enochs v. Williams Packing & Navigation Co., supra,* and in *Commissioner v. Shapiro, supra,* the Supreme Court has defined a judicially created exception to the Anti-Injunction Act. *Enochs* establishes two prongs, both of which must be satisfied, before an injunction may issue pursuant to § 7421. The first prong is that normal equity jurisdiction must obtain, *i.e.,* irreparable injury

and inadequacy of legal remedy. 370 U.S. at 6, 82 S.Ct. at 1128. The second independent criterion is that it must be clear that under "no circumstances" could the government ultimately prevail. Only if the government does not have "a chance of ultimately prevailing" and only if under the "most liberal view of the law and the facts" the United States cannot win, may a district court issue an injunction. 370 U.S. at 7, 82 S.Ct. at 1129.

The Supreme Court in *Shapiro* added a procedural gloss to the second prong of the *Enochs* test. In *Shapiro*, the Commissioner assessed taxes against the taxpayer and filed liens and notices of levy against his assets. Because the taxpayer needed these assets to post bail on pending criminal charges in Israel, he brought suit to lift the notices of levy. The government claimed that the Anti-Injunction Act precluded jurisdiction over the taxpayer's action. The Supreme Court held that because the second prong of *Enochs*—*i.e.*, that it is clear the government could under no circumstances prevail—must be resolved on the basis of the information available to the government at the time of the suit, there must be a mechanism for the taxpayer to obtain information from the Government.[10] Because the government there had produced no factual evidence supporting its assessment, the Supreme Court remanded for further factual development of the record in order that the taxpayer could better argue the second prong of *Enochs*. The court was concerned in *Shapiro* that permitting the government to seize and hold property on the basis of a good-faith allegation of an

10. The Supreme Court took no position on whether the government has the burden of producing evidence, or whether the taxpayer has the burden of initiating discovery to bring forth the evidence in the government's hands. 424 U.S. at 628, 96 S.Ct. at 1070.

unpaid tax would raise serious constitutional problems. 424 U.S. at 629, 96 S.Ct. at 1071. The Court made clear that the burden of persuasion still remained with the taxpayer on the second prong,[11] but held there must be some means by which a taxpayer could obtain information from the government with respect to this issue.

[4] After a thorough review of the record, we conclude that Kemlon failed to satisfy the first prong of the *Enochs* exception. We do not accept Kemlon's assertion that the Service waived any right to contest the existence of irreparable harm and inadequacy of a legal remedy. The statements by the Service's attorney at the September 8, 1978, hearing upon which Kemlon relies are ambiguous at best and do not support a finding of waiver of this issue. Moreover, the remainder of the record demonstrates the Service adamantly argued that Kemlon had not satisfied its burden of showing irreparable harm. In two separate memoranda, one supporting the Service's motion to dismiss and the other supporting its motion for the court to reconsider its May 22 order requiring disclosure of the specific questions, the Service argued that Kemlon had failed to plead sufficiently and to prove irreparable harm. (Record on Appeal, pp. 31-33 and pp. 100-101). At the March 29, 1978, hearing, the government suggested that if Kemlon were to put its evidence supporting its allegation of irreparable harm in affidavit form, a hearing on whether *Shapiro* required disclosure of the questions to be asked Kemlon's customer might be avoided. (Supp. Record on Appeal, pp. 32-33). In the

11. *Accord James v. United States*, 542 F.2d 16 (6th Cir. 1976), *cert. denied* 429 U.S. 1093, 97 S.Ct. 1107, 51 L.Ed.2d 540 (1977); *Schildcrout v. McKeever*, 580 F.2d 994 (9th Cir. 1978), and cases cited therein.

September 8, 1978, hearing, the Service expressly stated there had been no stipulation with respect to the irreparable harm issue; rather the Service said that part of its argument was based on this element of the *Enochs* exception. (Supp. Record on Appeal, pp. 44-45). In the discussion of whether there had been a stipulation of irreparable harm, Kemlon indicated it would stand on Ring's affidavit as proof of irreparable harm. (Supp. Record on Appeal, p. 43).

[5] Turning to the pleadings and evidence relating to irreparable harm, we note that Kemlon pleaded nothing more than its largest customers are interested in doing business only with those technological and research-oriented companies which are considered financially stable, and that disclosure of return information[12] to its customers would result in a loss of business reputation and the opportunity to work on new and other unique products for which patents could be available. (Record on Appeal, pp. 5-6). No specific facts were alleged; only the foregoing conclusory pleading. The affidavit of Ring, which Kemlon expressly adopted as establishing irreparable injury, merely repeated the above allegation with an additional assertion that Kemlon's customers are interested only in technological and research companies stable in the areas of acquiring raw materials for inventory, the manufacturing process, quality control process,

12. In defining "return information" in its complaint, Kemlon only quoted the part of the definition of "return information" in § 6103(b)(2) which says such information includes the identity of the taxpayer and whether or not the taxpayer's return is being, or will be, audited. Kemlon did not cite the part of § 6103(b)(2) which includes as "return information . . . any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return. . . ."

and the distribution process. (Record on Appeal, p. 126). The whole thrust of Kemlon's pleading and argument below was that irreparable harm would result through a loss of customers who would be concerned about Kemlon's financial well-being should they learn that Kemlon was being audited and its valuation of a certain patent was being examined. We emphasize that Kemlon in no way asserted or proved in the court below that irreparable harm would result because of the disclosure of confidential or secret information concerning the patent or other device.[13] Before this court, Kemlon has suggested that the purpose of this suit is to prevent disclosure by the government of confidential research and development data. Insofar as Kemlon is now arguing that irreparable harm would result because of customers' concern over disclosure of confidential data, such an argument is raised for the first time on appeal and shall not be heard.

[6] To describe Kemlon's allegation of irreparable harm is to decide this case.[14] Kemlon in effect has alleged, in conclusory fashion, that disclosure of the fact that it

13. In arguments concerning the Service's motion to dismiss, the Service characterized Kemlon's allegation as irreparable harm resulting from disclosure of the fact that it was under audit examination and not from the content of the questions to be asked. (Record on Appeal, p. 101). In response to this argument, Kemlon did not contest the characterization of how irreparable harm would occur, but again asserted that injury would result from any appearance of financial instability. (Record on Appeal, pp. 113-115).

14. As we read the Findings of Fact and Conclusions of Law of the district court, it did not find that Kemlon had met its burden of proving the first prong of *Enochs*, but instead improperly placed the burden of proof on the Service and found that burden not met. The district court first found that Kemlon had "claimed" irreparable harm, and then found that the Service had offered no evidence to controvert Kemlon's "claim" of irreparable injury. Combining those two findings, the district court concluded that disclosure of the return information would result in irreparable harm.

is under audit will cause it to lose customers because concern for its financial instability. It in no way alleged or proved facts indicating how its customers would infer financial instability from knowledge of an audit. It in no way alleged or proved facts showing how disclosure of an examination into the value of its patents would indicate financial instability. It very well may be that in the industry of research and development, customers are sensitive to the financial stability of researchers. But that in no way indicates that customers are technologically innovative products would assume developers are financially unsound merely from the fact of an audit. Given the frequency of audits of companies as large of Kemlon, and given the stringent policy not to interfere with the tax collection process as reflected by the Anti-Injunction Act, Kemlon had to plead and prove more to demonstrate irreparable harm resulting from disclosure of an audit.[15] We conclude that Kemlon has failed to meet its burden of poof of irreparable harm as specified by *Enochs* and *Shapiro.*

[7] Even assuming *arguendo* that Kemlon met its burden of proving irreparable harm, we conclude that the government has met the *Shapiro* requirement of coming forward with the basic facts from which it appears the government may prevail on Kemlon's § 6103(k)(6) claim.[16] Section 6103(k)(6) states that an Internal Reve-

15. The Service maintains on appeal that Kemlon has an adequate remedy at law under 26 U.S.C.A. § 7217, authorizing civil action for damages for the unauthorized intentional or negligent disclosure of return information protected by § 6103. We express no opinion on the adequacy of such a remedy.

16. The Service argues that the constitutional concern in *Shapiro* makes that case inapplicable to the instant case where no property would be seized by the Service's contact with Kemlon's customers.

nue officer may disclose return information for investigative purposes to the extent such information is "necessary" and is "not otherwise reasonably available." Temp. Treas. Reg. § 404.-6103(k)(6)-1(b)(1) (1977), provides that return information may be disclosed for the purpose of securing necessary information in establishing "the correctness or completeness of any return . . . or return information."[17] The government in the affidavit of Agent Brown established that it was seeking to determine whether any portion of the patents' value should be allocated to goodwill and to determine the patents' useful life. Such an inquiry would in all likelihood necessitate an interview with customers to determine why they deal with Kemlon and use the product in question and their projected future use of the product. The questions as generally described by Agent Brown are aimed at a determination of these facts. Kemlon claims that this information is "otherwise reasonably available,"—*i. e.*, through Kemlon. Agent Brown swore that use of Kemlon as intermediary would detract from the probity of the customer's responses, and that a direct contact would be necessary to ensure that responses were candid. All *Shapiro* requires is that the government establish basic facts from which it appears it may prevail. Viewing the

---

Because of our holdings, there is no need to address the validity of the Service's argument that *Shapiro* is limited to cases raising a constitutional concern. Comparison should be made to the only two circuit court cases applying *Shapiro*. *Schildcrout v. McKeever*, 580 F.2d 994 (9th Cir. 1978); *James v. United States*, 542 F.2d 16 (6th Cir. 1976), *cert. denied* 429 U.S. 1093, 97 S.Ct. 1107, 51 L.Ed. 2d 540 (1977), where wagering assessments had been made but no property seized. The Service's argument concerning the limitation of *Shapiro* apparently was not addressed in those cases.

17. This temporary regulation was promulgated as part of the Temporary Regulations on Procedure and Administration under the Tax Reform Act of 1976.

law and the facts liberally in favor of the Service, as we must,[18] we conclude the Service has amply established the possibility that it will prevail on the § 6103(k)(6) claim.

REVERSED.

18. *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. at 7, 82 S.Ct. at 1129; *see also Schildcrout v. McKeever*, 580 F.2d 994, 1000 (9th Cir. 1978).

KEMLON PRODUCTS AND DEVELOPMENT COMPANY, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES of America et al.,
Defendants-Appellants.

No. 79-1452

United States Court of Appeals,

Fifth Circuit.

May 29, 1981

United States, Internal Revenue Service and several officers thereof appealed order of the United States District Court for the Southern District of Texas, John V. Singleton, Jr., Chief Judge, enjoining them from disclosing tax return information to any of plaintiff taxpayers' business customers. The Court of Appeals, 638 F.2d 1315, reversed. On petition for rehearing and petition for rehearing en banc, the Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that: (1) the suggestion for rehearing en banc would be denied, where no member of the panel nor judge of the Court of Appeals in regular active service had requested that the court be polled on rehearing en banc; (2) the record on appeal could not be supplemented with items in the record in a related and pending litigation between the same parties; and (3) the Court of Appeals would not address the merits of taxpayer's claims that district court had jurisdiction of its claims, where taxpayer did not, in its brief on appeal, address the merits of the claims,

nor the reasoning of the district court in rejecting the claims.

Petition for rehearing en banc denied; petition for panel rehearing granted in part and denied in part.

Appeal from the United States District Court for the Southern District of Texas.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 12, 1981, 5 Cir. 1981, 638 F.2d 1315).

Before HILL, RUBIN and ANDERSON, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

[1] No member of this panel nor Judge of this Court in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Fed. R. App. P.; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

[2-4] We also deny Kemlon's motion to supplement the record with items now in the record in the related and pending refund litigation between these same parties (Civil Action No. H-79-782, Southern District of Texas). A court of appeals will not ordinarily enlarge the record on appeal to include material not before the district court. *Salama v. Virginia,* 605 F.2d 1329 (4th Cir. 1979); *United States v. Walker,* 601 F.2d 1051 (9th Cir. 1979); *Drexel v. Union Prescription Centers, Inc.,* 582 F.2d

781, 784 n.4 (3d Cir. 1978); 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*, § 3956 (1981). Also we conclude that it would be inappropriate in this case to take judicial notice of the extrarecord facts, as urged by Kemlon. *Compare United States v. Verlinsky*, 459 F.2d 1085 (5th Cir. 1972); *Landy v. Federal Deposit Insurance Corp.*, 486 F.2d 139 (3d Cir. 1973); *Parrish v. United States*, 376 F.2d 601 (4th Cir. 1967).

[5] However, Kemlon's petition for panel rehearing is granted to a limited extent. We withdraw footnote 8 of our opinion, and substitute the following footnote:

> Kemlon did mention in its brief on appeal that the district court had jurisdiction to entertain Kemlon's claims based on the Privacy Act of 1974 and the United States Constitution. The district court rejected both claims, holding that neither the Privacy Act nor the Constitution barred the disclosures at issue. Kemlon has not, in its brief on appeal, addressed the merits of either claim, nor the reasoning of the district court. It has made no substantial argument that it would be entitled to enjoin the proposed investigation based on either the Privacy Act or the Constitution, but instead argues in effect that if taxpayer has such rights, injunctions to preserve such rights are not within the scope of the Anti-Injunction Act. Accordingly, we do not address the merits of either claim.

As thus modified, our previous panel opinion is reinstated and Kemlon's petition for rehearing is denied in all other respects.

The suggestion for rehearing en banc is DENIED.

The petition for panel rehearing is GRANTED IN PART AND DENIED IN PART.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-78-271

KEMLON PRODUCTS AND DEVELOPMENT COMPANY, KEYSTONE ENGINEERING CO., SANDIFORD and MARGARET RING, RUSSELL K. and EVA M. RING, WILLIAM S. RING, JOHN H. and J. GAIDEN RING,
Plaintiffs,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, ROBERT M. McKEEVER, District Director of the Austin District, GARY D. BROWN, Internal Revenue Agent and ROBERT ELIASON, Internal Revenue Agent,
Defendants.

ORDER

The above-styled-and-numbered cause is an action brought to preliminarily and permanently enjoin defendants from unlawfully disclosing "return information" to plaintiffs' business customers. Plaintiff Kemlon Products and Development Company (Kemlon) manufactures and sells certain patented products in the oil and gas industry. Since December, 1976, plaintiffs have been under audit examination by the Internal Revenue Service to determine whether or not the value of a patented product sold by plaintiff Kemlon is lower than that claimed by

Kemlon for its fiscal year which ended September 30, 1975. Plaintiffs have provided defendants with all information requested with respect to the audit, but defendants have informed plaintiffs of their intention to contact one of the plaintiffs' largest customers of the patented product to obtain additional information concerning the value of the product.

Plaintiffs have filed this cause to enjoin such disclosure on three grounds: (1) disclosure would violate title 26 U.S.C. § 6103(k)(6), which prohibits disclosure unless it is necessary to obtain information not otherwise reasonably available with respect to the correct determination of tax liability; (2) disclosure would violate 5 U.S.C. § 552A(B) of the Privacy Act of 1974; and (3) disclosure would be an unlawful invasion of plaintiffs' constitutionally protected right of privacy. Plaintiffs assert that through disclosure of the facts surrounding the Internal Revenue Service audit, they would suffer irreparable injury to their business reputation and opportunity to work on new and other unique products for which patents could be available and that it would be impossible to quantify such injury in money damages.

Defendants have filed a motion to dismiss this cause on the ground that 26 U.S.C. § 7421(a) (the Anti-Injunction Act) bars the injunctive relief sought. In relevant part section 7421(a) provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . ." Although plaintiffs argue that section 7421 (a) does not apply to their attempt to restrain the alleged unlawful disclosure of return information, the court finds that because the Internal Revenue Service's desire to do

so is related to a potential assessment against Kemlon, this cause falls clearly within section 7421(a)'s prohibition. Furthermore, the circumstances surrounding the enactment of section 6103(k)(6) as part of the Tax Reform Act of 1976 so indicate. The legislative history concerning enforcement of section 6103 is silent as to injunctive relief but discusses the criminal penalties and civil damages provided for a violation of section 6103. *See* S. REP. NO. 94-938, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3771, 3778. Moreover, although Congress amended section 7421(a) in the Tax Reform Act of 1976 by adding to the list of exceptions to its prohibition against injunctions, section 6103 was not included. Therefore, the court finds that section 7421(a) bars the injunctive relief sought by plaintiffs unless they can sustain the burden of proving that they fall within the judicial exception to section 7421(a).

In the context of an appeal of an injunction restraining the Internal Revenue Service from collecting a tax assessed against a corporation, the Supreme Court discussed the purpose of section 7421(a) and announced an exception to its prohibition consistent with that purpose.

> The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue. Nevertheless, if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and, under the Nut Margarine Case, the attempted collection may be enjoined if equity jurisdiction

> otherwise exists. In such a situation the exaction is merely in "the guise of a tax."
>
> We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained. Otherwise, the District Court is without jurisdiction, and the complaint must be dismissed.

Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 8 L.Ed.2d 292, 82 S.Ct. 1125 (1962) (footnote and citation omitted). Although it appears from defendants' brief and the affidavits filed therewith that the defendants' desire to reveal "return information" to one of Kemlon's customers in connection with the valuation of Kemlon's patent is proper under section 6103(k)(6), the court is concerned that plaintiffs have made a substantial claim of irreparable injury as required under *Enochs*. Furthermore, plaintiffs have been unable to address the *Enochs* requirement that the Government be unable to ultimately prevail with respect to the propriety of section 6103(k)(6) disclosure for the reason that the defendants have been unwilling to reveal the type of information they seek from Kemlon's customer. Without this knowledge, plaintiffs cannot address the questions under section 6103(k)(6) of whether such information is necessary for the valuation of Kemlon's patent and whether such information is otherwise reasonably available.

In *Commissioner v. Shapiro*, 424 U.S. 614 (1976), the court found that unless the taxpayer had an opportunity to inquire into the factual basis for the Govern-

ment's action sought to be enjoined, it had no opportunity to meet the requirement under *Enochs* that the Government could not prevail. Plaintiffs argue, and the court agrees, that defendants should provide plaintiffs with a list of questions to be asked of Kemlon's customer in order to provide plaintiffs with such an opportunity in this case. Consistent with defendants' contention that the information they seek from Kemlon's customer must be independently and objectively obtained, plaintiffs will be ordered not to contact Kemlon's customer or any other third party concerning this list of questions during the pendency of this cause. The plaintiffs have the difficult burden of showing that the Government has no factual or legal basis to disclose return information, but the court believes that they should have an opportunity to do so with knowledge of the information the Internal Revenue Service seeks from Kemlon's customer.

The court rejects defendants' argument that section 6103(k)(6) cannot apply to information disclosed in a judicial proceeding for the reasons stated in plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, pp. 12-13. Furthermore, the court rejects plaintiffs' claims that disclosure is barred by the Privacy Act of 1974 and the United States Constitution for the reasons stated in defendants Memorandum in Support of Motion to Dismiss, pp. 22-27. The only issue remaining in this case is whether or not, after disclosure by defendants to plaintiffs of the list of questions to be asked of Kemlon's customer, plaintiffs can sustain their burden of showing that this cause falls within the exception to section 7421 (a) enunciated in *Enochs*.

Therefore, it is ORDERED that

(1) defendants shall provide plaintiffs with a list of questions they desire to ask of Kemlon's customer within ten (10) days of this Order;

(2) plaintiffs shall by a memorandum and/or affidavits address the issue of whether this case falls within the *Enochs* exception to section 7421(a) within twenty (20) days of receipt of defendants' list of questions; and

(3) plaintiffs shall not contact Kemlon's customers or any other third party in connection with defendants' list of questions.

DONE at Houston, Texas, on the 22nd day of May, 1978.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-78-271

KEMLON PRODUCTS AND DEVELOPMENT COMPANY, KEYSTONE ENGINEERING COMPANY, SANDIFORD AND MARGARET RING, RUSSELL K. AND EVA M. RING, WILLIAM S. RING, JOHN H. AND J. GAIDEN RING,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, ROBERT M. McKEEVER, DISTRICT DIRECTOR OF THE AUSTIN DISTRICT, GARY D. BROWN, INTERNAL REVENUE AGENT, AND ROBERT ELIASON, INTERNAL REVENUE AGENT,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiff Kemlon Products and Development Company is engaged in the business of manufacturing and selling certain patented products to various businesses which are engaged in the oil industry.

2. Plaintiff Kemlon manufactures and distributes such patented products for use in the drilling of low-depth oil and gas wells.

3. Plaintiff Kemlon is the owner of 15 point patent on their major product.

4. Plaintiffs Kemlon and Keystone Engineering Company are engaged in the research and development of technologically innovative products for use in the oil and gas industry.

5. Plaintiffs Sandiford Ring, Russell K. Ring, William S. Ring, and John H. Ring are officers and shareholders of plaintiffs Kemlon Products and Keystone Engineering.

6. Since December, 1976, plaintiffs have been under audit examination by defendants, one of the purposes of which is to determine the value, for tax purposes, of plaintiff Kemlon's patented product.

7. During the period of the audit, plaintiffs have provided defendants with all the information and records which they have requested in connection with the audit.

8. Defendants have informed plaintiffs of their intention to contact one of plaintiff Kemlon's largest customers of its patented product.

9. Plaintiffs have requested that defendants inform them of the questions which they seek to ask of plaintiffs' business customers in order that plaintiffs can be given the opportunity to provide the information sought by such questions to defendants.

10. Defendants have refused to provide such questions to plaintiffs.

11. Plaintiffs have claimed in an affidavit of John H. Ring that defendants' asking questions of plaintiffs' customers would result in irreparable harm to plaintiffs' business reputation and would prohibit plaintiffs from developing and marketing new products.

12. Because of the indefinite number of new products which could be developed and the difficulty in determining the amount of revenue which would be received by plaintiffs from future patents and exclusive manufacturing contracts, it is impossible to quantify in money damages the harm which would result to plaintiffs from disclosure of return information to plaintiffs' business customers.

13. Defendants have offered no evidence to controvert plaintiffs' claim that they would suffer irreparable injury for which there is no adequate remedy at law as a result of defendants disclosing return infomation to plaintiffs' business customers.

14. The disclosure of return information to plaintiffs' business customers will result in irreparable injury to plaintiffs for which there is no adequate remedy at law.

15. Defendants have refused to comply with this court's Order of May 22, 1978, requiring that the questions proposed to be asked to plaintiff Kemlon's business customers be disclosed to plaintiffs and have further stated that, despite such Order, they will not provide such questions.

16. Defendants have prepared and submitted to the court, under seal, specific questions sought to be asked of plaintiff Kemlon's business customers but have refused to provide such questions to plaintiffs.

17. Defendants requested in open court that a permanent injunction be issued in the event the court over-

ruled their motion for reconsideration in order that an appeal could be taken on the issue of whether there is jurisdiction to decide this case.

CONCLUSIONS OF LAW

1. Section 6103(k)(6) of 26 U.S.C. prohibts the Internal Revenue Service and its agents and representatives from disclosing return information to third parties in connection with a tax audit, unless such disclosure is necessary to obtain information not otherwise reasonably available with respect to the correct determination of tax liability.

2. Under 26 U.S.C. § 6103(b)(2), "return information" includes the taxpayer's identity and whether the taxpayer's return was, is being, or will be examined or subjected to other investigation or processing.

3. The disclosure by the defendants of return information would not violate 5 U.S.C. § 552a(b) of the Privacy Act of 1974 and would not constitute an unlawful invasion of plaintiffs' constitutionally protected right of privacy.

4. Plaintiffs' suit for temporary and permanent injunction is a suit to restrain the collection or assessment of taxes and falls within the ambit of 26 U.S.C. § 7421(a).

5. Under *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), an exception to 26 U.S.C. § 7421(a) exists when it is clear that under no circumstances can the Government ultimately prevail on the merits of the action and equity jurisdiction otherwise exists.

6. Plaintiffs are entitled to be furnished the questions which defendants propose to ask plaintiff Kemlon's customers to aid plaintiffs in attempting to meet the first requirement of the *Enochs* exception, *i.e.* that under no circumstances could the Government ultimately prevail on the merits of this action. *See Commissioner v. Shapiro*, 424 U.S. 614 (1976).

7. Because of the failure of defendants to furnish said questions to plaintiffs, plaintiffs are unable to show that under no circumstances would the Government ultimately prevail on the merits of this action.

8. The disclosure of return information to plaintiffs' business customers will result in irreparable injury to plaintiffs for which there is no adequate remedy at law.

9. An appropriate sanction for defendants' failure to provide plaintiffs with the proposed questions is an order enjoining defendants from contacting plaintiff Kemlon's business customers.

DONE at Houston, Texas, on the 27th day of March, 1979.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-78-271

KEMLON PRODUCTS AND DEVELOPMENT COMPANY, KEYSTONE ENGINEERING COMPANY, SANDIFORD AND MARGARET RING, RUSSELL K. AND EVA M. RING, WILLIAM S. RING, JOHN H. AND J. GAIDEN RING,
Plaintiffs

v.

THE UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, ROBERT M. McKEEVER, DISTRICT DIRECTOR OF THE AUSTIN DISTRICT, GARY D. BROWN, INTERNAL REVENUE AGENT, AND ROBERT ELIASON, INTERNAL REVENUE AGENT,
Defendants

FINAL JUDGMENT

Be it remembered that on this the ___ day of _____, 1978, came on to be heard Plaintiffs' Motion for Judgment. The Court, having examined the pleadings, affidavits, motions, memorandums and other papers on file in this cause, and having heard the arguments of counsel, is of the opinion that the relief prayed for by Plaintiffs should be granted; and

It is accordingly ORDERED, ADJUDGED and DECREED that Defendants' motion for reconsideration of

this Court's Order of May 22, 1978 be in all respects denied; and

It is further ORDERED, ADJUDGED and DECREED that Defendants, their agents, servants and employees be and the same are hereby permanently enjoined from disclosing return information to Plaintiff's business customers; and

It is further ORDERED, ADJUDGED and DECREED that all costs of this proceeding be assessed against Defendants; and

It is further ORDERED, ADJUDGED and DECREED that this Judgment be in all respects final.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

Approved as to form
and substance:

BAKER, BROWN, SHARMAN,
WISE & STEPHENS

By: /s/ J. MICHAEL BELL
J. Michael Bell
Edward D. Urquhart
1122 Riviana Building
2777 Allen Parkway
Houston, Texas 77019
(713) 529-1896

ATTORNEYS-IN-CHARGE
FOR PLAINTIFFS

Approved as to form only:

By: /s/ MICHAEL J. KEARNS
Michael J. Kearns
Tax Division
U. S. Department of Justice
Washington, D. C. 20530

ATTORNEY-IN-CHARGE
FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-79-782

KEMLON PRODUCTS AND DEVELOPMENT CO., ET AL,
Plaintiffs

v.

THE UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, ET AL,
Defendants

MEMORANDUM OPINION AND ORDER

In this suit, the plaintiffs seek to recover taxes they claim were illegally collected by the Internal Revenue Service (IRS). The jurisdiction of the court is properly invoked pursuant to 28 U.S.C. § 1346(a)(1).

During the course of discovery and pretrial motions, the plaintiffs found what they assert are discrepancies in Agent Brown's deposition and affidavits. They also claim that Agent Brown continued to question Kemlon's business customers concerning Kemlon's product after the IRS had been enjoined, in a suit concerning the value of Kemlon's patent for tax purposes, from contacting Kemlon's customers. For the alleged discrepancies in Agent Brown's deposition and affidavits, and for his actions allegedly in violation of the injunction, the plaintiffs have filed a Motion to Hold Agent Gary D. Brown in Contempt of Count and a Motion for Sanctions under Fed. R. Civ. P. 37(b)(2).

The government has not plead or submitted any evidence asserting the defense that Agent Brown was not acting within the course and scope of his employment when he performed the questionable acts. Therefore, the court considers that defense waived and assumes that Agent Brown was at all pertinent times acting within the course and scope of his employment.

The government also has not plead sovereign immunity. However, certain principles of law and statutes limit the court's authority to award damages against the United States. They will be discussed below.

The court held a hearing regarding these matters on August 4, 1980. Based on the facts found at the hearing and the law, both of which are contained herein, the court concludes that Agent Brown is in Contempt of Court for violating the injunction, for making evasive and incomplete statements in his deposition taken under court order, and for submitting an affidavit in bad faith. Payment of compensatory damages and sanctions will be imposed on Agent Brown.

FINDINGS OF FACT

A. *March 31, 1978 Affidavit*

On November 16, 1977, IRS Agent Gary D. Brown examined the 1974-1977 invoices of Kemlon Products and Development Co. (Kemlon), as part of his investigation of the value of Kemlon's patent on a connector. The invoices he examined included invoices from S.I.E. Inc. (S.I.E.) and Birdwell Corp. (Birdwell), customers of Kemlon. S.I.E. also competes with Kemlon.

December 2 and 12, 1977, Agent Brown contacted S.I.E. He discussed S.I.E.'s connector as it compares

with Kemlon's with Mr. Hawthorne, President of S.I.E. Mr. Hawthorne testified at the August 4, 1980 hearing. He stated that he infomed Brown that S.I.E.'s connector had a single seal whereas Kemlon's had a dual seal. He explained to Brown that the two connectors were used in different situations.

On March 31, 1978, Agent Brown filed an affidavit in connection with a suit for an injunction filed by Kemlon. In that affidavit, Agent Brown stated that he had not yet made contact with business customers of Kemlon (Affidavit of Agent Gary D. Brown, 3/31/78, at 10 ¶ 20.) In light of Agent Brown's knowledge that S.I.E. purchased from Kemlon and his contact with S.I.E. prior to March 31, 1978, Agent Brown's statement in his March 31, 1978 affidavit was unwarranted.

B. *September 6, 1979 Contact with Birdwell in Violation of Injunction*

On February 10, 1978 the plaintiff filed suit in this court to enjoin the defendants from disclosing any tax return information to Kemlon's business customers (78-H-271). On December 28, 1978, this court "enjoined the defendants from disclosing return information to plaintiff's business customers." (Findings of Fact and Conclusions of Law entered March 27, 1979.)

On September 6, 1979, Agent Brown contacted Birdwell, a customer of Kemlon. Agent Brown knew Birdwell purchased from Kemlon because he saw Birdwell invoices in the Kemlon files he examined on November 16, 1977. Agent Brown's contact with Birdwell violated the court's injunction against contact with business customers of Kemlon which this court entered on December 28, 1978.

C. *Activities Contrary to Supervisor's Instructions*

On February 22, 1978, Agent Brown was advised by his superiors to cease all activities in connection with the valuation of Kemlon's patent because of the suit filed in 1978.

On September 7, 1979, Agent Brown interviewed Mr. Louis Williams, President of H & W Products (H & W), which is a competitor of Kemlon, concerning H & W's and Kemlon's connectors. Mr. Williams explained that the two connectors resembled each other externally, but they differed internally. Kemlon's had a double seal, whereas H & W's had only a single seal. Therefore, if the ceramic broke on an H & W connector, the connector would leak. If it broke on a Kemlon connector, the connector would not leak (Plaintiff's Motion for Order Holding Defendant Gary D. Brown in Contempt of Court, Affidavit of Louis J. Williams at ¶ 7.)

Agent Brown's conversations with Mr. Williams and with Birdwell contravene the instructions his supervisor gave him on February 22, 1978 to cease all activity pertaining to Kemlon.

D. *September 10, 1979 Affidavit in Opposition to Plaintiff's Motion for Partial Summary Judgment.*

On September 10, 1979, Agent Brown filed an Affidavit in Opposition to the Plaintiffs' Motion for Partial Summary Judgment. In that affidavit he stated,

> During the course of participation in determining the accuracy of the value of the above described patents, affiant discovered evidence that connectors produced by competitors of Kemlon, which were of comparable specification to the patented connectors sold

> by Kemlon, may have been available for sale on the market on the valuation date, October 1, 1974.

Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment, Affidavit of Agent Brown, Sept. 10, 1979, at ¶ 5.

At the hearing on August 4, 1980, Agent Brown testified that the only competitors he was referring to in the above quoted paragraph of his affidavit were Rochester and S.I.E.

In December 1977, Agent Brown contacted Mr. Dudley B. Guy, Product Manager of the Rochester Corporation (Rochester) regarding connectors. Mr. Guy testified at the August 4, 1980 hearing. He stated that the only information he gave Agent Brown was that Rochester's connector was advertised to be suitable in an environment of 20,000 psi pressures and temperatures to 400°F. Mr. Guy testified that such information could not have revealed any feature of the connector's design or construction, which could be used to determine the value of Kemlon's patent.

In light of Agent Brown's conversations with Mr. Hawthorne (December 12, 1977) and Mr. Guy, Agent Brown's statement in his September 10, 1979 affidavit that connectors with comparable specifications to Kemlon's were produced was without a basis in fact and was made knowing it was without a basis in fact.

E. *March 13, 1980 Deposition Pursuant to Order Compelling Discovery*

On March 13, 1980, Agent Brown was deposed, pursuant to a court order compelling discovery (Order

entered Jan. 21, 1980). At the deposition, under oath, Agent Brown stated that he did not believe S.I.E. purchased connectors from Kemlon. However at that time he knew S.I.E. was a Kemlon customer.

CONCLUSIONS OF LAW

A. *Violation of the Court's Injunction*

The court's power to provide injunctive relief is reinforced by its power to hold persons in contempt for violation of the injunction. The source of the court's power to hold a person in civil or criminal contempt is set forth in 18 U.S.C. § 401. That section provides:

> *Power of Court*
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

In *In re Stewart*, 571 F.2d 958 (5th Cir. 1978), the Fifth Circuit explained the distinction between civil and criminal contempt. It wrote,

> Civil contempt is remedial; the penalty serves to enforce compliance with a court order or to compensate an injured party. Criminal contempt is

> punitive; the penalty serves to vindicate the authority of the Court and does not terminate upon compliance with the court order.

571 F.2d at 963.

In a civil contempt situation, full compensation to a party injured by contumacious act might include damages, court costs, litigation expenses, and attorneys' fees. Although the American jurisprudential system generally prohibits the award of attorneys' fees to prevailing parties, there is a judicial exception to the rule which permits the award of attorneys' fees in a contempt proceeding.[1] In *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 420 (1975), the Supreme Court stated:

> [A] court may assess attorneys' fees for the "willful disobedience of a court order . . . as part of the fine to be levied on the defendant,". . . or when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congrss . . .

421 U.S. at 258-259 (citations omitted).

---

1. There are also several statutory exceptions to the rule. They include the award of attorneys' fees to a prevailing plaintiff in civil rights suits (42 U.S.C. § 1988), and the award of attorneys' fees to the prevailing party in patent litigation (35 U.S.C. § 285). Under the Federal Rules of Civil Procedure attorneys fees may be awarded against a party who fails to comply with an order compelling discovery (Fed. R. Civ. P. 37(b)), or against a party who submits an affidavit in bad faith in connection with a motion for summary judgment (Fed. R. Civ. 56(g)). The exceptions under Fed. R. Civ. P. 37(b) & 56(g) and their applicability to the federal government, will be discussed below.

Thus, if a party willfully disobeys a court order, or acts in bad faith, vexatiously, or for oppressive reasons and thereby violates a court order, the court can, finding that party in contempt, grant compensatory damages including attorneys' fees, to be paid to the injured party.

But, sovereign immunity limits the United States' liability for monetary damages. The government is liable only to the extent that Congress has authorized it. In 28 U.S.C. § 2412, Congress authorized the award of costs and expenses against the government but excluded the award of attorneys' fees.[2] This limitation on liability supersedes the bad faith exception to he "American rule" described in *Alyeska Pipeline Service Co.* Thus, where the federal government or its agent is found in contempt of court, or is found to have acted in bad faith, vexatiously, or wantonly, the government may be liable for compensatory damages, but not attorneys' fees.

---

2. 28 U.S.C. § 2412 provides:

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation.

Recent amendments to 28 U.S.C. § 2412 change this rule. They authorize the award of reasonable attorneys fees and expenses of attorneys against the United States, unless expressly prohibited by statute, "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. § 2412(b), as amended by Equal Access to Justice Act of Oct. 21, 1980, Pub. L. No. 96-481, 94 Stat. 2325. The new amendments will be effective October 1, 1981.

The court finds Agent Brown in contempt of court for contacting Birdwell, a customer of Kemlon's, in violation of the court's injunction prohibiting contact with Kemlon's business customers. The contempt is civil in nature. To compensate Kemlon for the damage it has suffered, the court orders the United States to award Kemlon compensatory damages, including expenses and costs, and excluding attorneys' fees incurred by Kemlon due to Agent Brown's violation of the injuction. The amount of said damages shall be determined by this court at a hearing.

B. *Contempt of Court Order Compelling Discovery*

The court finds that Agent Brown's statement in the March 13, 1980 deposition was evasive and incomplete, and constitutes a failure to answer. It was made in contempt of a court order compelling discovery. Under Fed. R. Civ. P. 37(b)(2) sanctions may be imposed. The rule provides that:

> [T]he court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the

> order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> . . .
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order . . . to pay the reasonable expenses, including attorney's fees, caused by the failure . . .

Under Fed. R. Civ. P. 37(f), "[e]xcept to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule."

The court imposes the following sanctions for Agent Brown's failure to comply with this court's order compelling discovery. Agent Brown shall be prohibited from testifying as a government witness in this or any suit pertaining to the value of Kemlon's patent. Agent Brown's Engineering and Valuation Report, Engineer Memorandum Report, and his Revenue Agent's Report shall be excluded from evidence as a government exhibition in this or any suit pertaining to the value of Kemlon's patent.

The court also awards the plaintiff all litigation expenses and court costs, but not attorneys' fees, generated by the defendant's failure to comply with the order compelling discovery. 28 U.S.C. § 2412 permits the award of expenses and costs, but not attorneys' fees. Thus, under Rule 37(f), the award of expenses and fees against the government is authorized. The amount of the award shall be determined at the hearing before this court.

C. *Affidavit in Opposition to Plaintiffs' Motion for Partial Summary Judgment Made in Bad Faith*

Federal Rule of Civil Procedure 56(g) provides:

> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorneys' fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 56(g) specifically authorizes the award of attorneys' fees for affidavits made in bad faith, but it does not specify the United States' liability for attorneys' fees. In light of 28 U.S.C. § 2412's explicit instruction that "[e]xcept as otherwise specifically provided by statute" the government shall not be liable for the fees and expenses of attorneys, Rule 56(g)'s omission of reference to the United States forecloses the award of attorneys' fees against the governmnt for the submission of affidavits made in bad faith.[3]

Agent Brown's Affidavit in Opposition to the Plaintiffs' Motion for Summary Judgment was made in bad faith. His bad faith is evidenced by the following actions. He made statements under oath, knowing them to be without basis in fact, in his March 31, 1978 affidavit, his September 10, 1979 affidavit, and the March 13, 1980 deposition. In addition, he continued to investigate the plaintiffs and contact their customers after his super-

3. Such an award is foreclosed until the amendments to 28 U.S.C. § 2412 are effective in October, 1981.

visor directed him to cease all activities and after the court enjoined him and the IRS from contacting the plaintiffs' business customers. The pattern of knowingly making unfounded statements, of disregarding both his supervisor's instructions and the Court's injunction evidence bad faith. In light of this pattern, and pursuant to Fed. R. Civ. P. 56(g), the court finds that Agent Brown's statement is ¶ 5 of his Septmeber 10, 1979 Affidavit in Opposition to the Plaintiffs' Motion for Summary Judgment was made in bad faith. Therefore, the court orders the United States to award Kemlon the amount of reasonable expenses which the filing of the affidavit caused the plaintiff to incur, excluding attorneys' fees. The amount of said damages shall be determined at a hearing before this court.

In accordance with this Findings of Fact and Conclsions of Law, it is hereby ORDERED, ADJUDGED, and DECREED that Agent Gary D. Brown is in contempt of court for violation of its injunction. The court ORDERS the defendants to compensate the plaintiffs for the damages caused by Agent Brown's violation of the injunction.

It is further ORDERED, ADJUDGED, and DECREED that the following sanctions be imposed on the defendants, pursuant to Rule 37(b), for his evasive and incomplete statement in his deposition taken under a court order compelling discovery. Agent Gary D. Brown is prohibited from testifying as a government witness in this suit or at any proceeding in connection with the value of Kemlon's patent. Agent Brown's Engineering and Valuation Report, Engineer Memorandum Report, and his Revenue Agent's Report are prohibited

from being used by the government in this suit or in any proceeding in connection with the valuation of Kemlon's patent. In addition, the government is Ordered to compensate the plaintiffs for the court costs and litigation expenses generated by the failure to comply with the order compelling discovery.

It is also ORDERED, ADJUDGED, and DECREED that Agent Brown is in Contempt of Court, pursuant to Rule 56(g), for filing an Affidavit in Opposition to a Motion for Summary Judgment in bad faith. The court ORDERS the defendants to award Kemlon a reasonable amount for litigation costs and expenses which the filing of the affidavit caused them.

The amount of the award for violation of the injunction, for failure to comply with a court order compelling discovery, and for the submission of the affidavit in bad faith shall be determined at a hearing to be held by this court on the 30th day of March, 1981, at 1:30 P.M.

DONE this 24th day of February, 1981 in Houston, Texas.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

U.S. CONSTITUTION AMENDMENT IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONSTITUTION AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 U.S.C.A. SEC. 6103. CONFIDENTIALITY AND DISCLOSURE OF RETURNS AND RETURN INFORMATION.

(a) GENERAL RULE—Returns and return information shall be confidential, and except as authorized by this title—

(1) no officer or employee of the United States,

(2) no officer or employee of any State or of any local child support enforcement agency who has or

had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), subsection (m)(4)(B), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

26 U.S.C.A. SEC. 6103

(b) DEFINITIONS.—For purposes of this section—

(1) RETURN.—the term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) RETURN INFORMATION.—The term "return information" means—

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies,

overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

(3) TAXPAYER RETURN INFORMATION.—The term "taxpayer return information" means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates.

(4) TAX ADMINISTRATION.—The term "tax administration"—

(A) means—

(i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue

laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and

(ii) the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and

(B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

(5) STATE.—The term "State" means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(6) TAXPAYER IDENTITY.—The term "taxpay identity" means the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof.

(7) INSPECTION.—The terms "inspected" and "inspection" mean any examination of a return or return information.

(8) DISCLOSURE.—The term "disclosure" means the making known to any person in any manner whatever a return or return information.

(9) FEDERAL AGENCY.—The term "Federal agency" means an agency within the meaning of section 551(1) of Title 5, United States Code.

26 U.S.C.A. SEC. 6103(k)(6)

(6) DISCLOSURE BY INTERNAL REVENUE OFFICERS AND EMPLOYEES FOR INVESTIGATIVE PURPOSES.—An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

26 U.S.C.A. SEC. 6861. JEOPARDY ASSESSMENTS OF INCOME, ESTATE, GIFT, AND CERTAIN EXCISE TAXES.

(a) AUTHORITY FOR MAKING.—If the Secretary believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213 (a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary for the payment thereof.

(b) DEFICIENCY LETTERS.—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed

under section 6212(a), then the Secretary shall mail a notice under such subsection within 60 days after the making of the assessment.

(c) AMOUNT ASSESSABLE BEFORE DECISION OF TAX COURT.—The jeopardy assessment may be made in respect of a deficiency greater or less than that notice of which has been mailed to the taxpayer, despite the provisions of section 6212(c) prohibiting the determination of additional deficiencies, and whether or not the taxpayer has theretofore filed a petition with the Tax Court. The Secretary may, at any time before the decision of the Tax Court is rendered, abate such assessment, or any unpaid portion thereof, to the extent that he believes the assessment to be excessive in amount. The Secretary shall notify the Tax Court of the amount of such assessment, or abatement, if the petition is filed with the Tax Court before the making of the assessment or is subsequently filed, and the Tax Court shall have jurisdiction to redetermine the entire amount of the deficiency and of all amounts assessed at the same time in connection therewith.

(d) AMOUNT ASSESSABLE AFTER DECISION OF TAX COURT.—If the jeopardy assessment is made after the decision of the Tax Court is rendered, such assessment may be made only in respect of the deficiency determined by the Tax Court in its decision.

(e) EXPIRATION OF RIGHT TO ASSESS.—A jeopardy assessment may not be made after the decision of the Tax Court has become final or after the taxpayer has filed a petition for review of the decision of the Tax Court.

(f) COLLECTION OF UNPAID AMOUNTS.—When the petition has been filed with the Tax Court and when the amount which should have been assessed has been determined by a decision of the Tax Court which has become final, then any unpaid portion, the collection of which has been stayed by bond as provided in section 6863(b) shall be collected as part of the tax upon notice and demand from the Secretary, and any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 6402, without the filing of claim therefor. If the amount determined as the amount which should have been assessed is greater than the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the Secretary.

(g) ABATEMENT IF JEOPARDY DOES NOT EXIST. -The Secretary may abate the jeopardy assessment if he finds that jeopardy does not exist. Such abatement may not be made after a decision of the Tax Court in respect of the deficiency has been rendered or, if no petition is filed with the Tax Court, after the expiration of the period for filing such petition. The period of limitation on the making of assessments and levy or a proceeding in court for collection, in respect of any deficiency, shall be determined as if the jeopardy assessment so abated had not been made, except that the running of such period shall in any event be suspended for the period from the date of such jeopardy assessment until the expiration of the 10th day after the day on which such jeopardy assessment is abated.

26 U.S.C.A. SEC. 6863. STAY OF COLLECTION OF JEOPARDY ASSESSMENTS.

(a) BOND TO STAY COLLECTION.—When an assessment has been made under section 6851, 6861, or 6862, the collection of the whole or any amount of such assessment may be stayed by filing with the Secretary, within such time as may be fixed by regulations prescribed by the Secretary, a bond in an amount equal to the amount as to which the stay is desired, conditioned upon the payment of the amount (together with interest thereon) the collection of which is stayed, at the time at which, but for the making of such assessment, such amount would be due. Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If any portion of such assessment is abated, the bond shall, at the request of the taxpayer, be proportionately reduced.

(b) FURTHER CONDITIONS IN CASE OF INCOME, ESTATE, OR GIFT TAXES.—In the case of taxes subject to the jurisdiction of the Tax Court—

(1) PRIOR TO PETITION TO TAX COURT.—If the bond is given before the taxpayer has filed his petition under section 6213(a), the bond shall contain a further condition that if a petition is not filed within the period provided in such section, then the amount, the collection of which is stayed by the bond, will be paid on notice and demand at any time

after the expiration of such period, together with interest thereon from the date of the jeopardy notice and demand to the date of notice and demand under this paragraph.

(2) EFFECT OF TAX COURT DECISION.—The bond shall be conditioned upon the payment of so much of such assessment (collection of which is stayed by the bond) as is not abated by a decision of the Tax Court which has become final. If the Tax Court determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Tax Court is rendered the bond shall, at the request of the taxpayer, be proportionately reduced.

(3) STAY OF SALE OF SEIZED PROPERTY PENDING TAX COURT DECISION—

(A) GENERAL RULE.—Where, notwithstanding the provisions of section 6213(a), an assessment has been made under section 6851 or 6861, the property seized for collection of the tax shall not be sold—

(i) before the expiration of the periods described in subsection (c)(1)(A) and (B),

(ii) before the issuance of the notice of deficiency described in section 6851(b) or 6861 (b), and the expiration of the period provided in section 6213(a) for filing a petition with the Tax Court, and

(iii) if a petition is filed with the Tax Court (whether before or after the making of such assessment), before the expiration of the period

during which the assessment of the deficiency would be prohibited if neither sections 6851(a) nor 6861(a) were applicable.

Clauses (ii) and (iii) shall not apply in the case of a termination assessment under section 6851 if the taxpayer does not file a return for the taxable year by the due date (determined with regard to any extensions).

(B) EXCEPTIONS.—Such property may be sold if—

(i) the taxpayer consents to the sale,

(ii) the Secretary determines that the expenses of conservation and maintenance will greatly reduce the net proceeds, or

(iii) the property is of the type described in section 6336.

(c) STAY OF SALE OF SEIZED PROPERTY PENDING DISTRICT COURT DETERMINATION UNDER SECTION 7429.—

(1) GENERAL RULE.—Where a jeopardy assessment has been made under section 6862(a), the property seized for the collection of the tax shall not be sold—

(A) if a civil action is commenced in accordance with section 7429(b), on or before the day on which the district court judgment in such action becomes final, or

(B) if subparagraph (A) does not apply, before the day after the expiration of the period provided in section 7429(a) for requesting an

administrative review, and if such review is requested, before the day after the expiration of the period provided in section 7429(b), for commencing an action in the district court.

(2) EXCEPTIONS.—With respect to any property described in paragraph (1), the exceptions provided by subsection (b)(3)(B) shall apply.

26 U.S.C.A. SEC 7217. CIVIL DAMAGES FOR UNAUTHORIZED DISCLOSURE OF RETURNS AND RETURN INFORMATION.

(a) GENERAL RULE.— Whenever any person knowingly, or by reason of negligence, discloses a return or return information (as defined in section 6103(b) with respect to a taxpayer in violation of the provisions of section 6103, such taxpayer may bring a civil action for damages against such person, and the district courts of the United States shall have jurisdiction of any action commenced under the provisions of this section.

(b) NO LIABILITY FOR GOOD FAITH, BUT ERRONEOUS, INTERPRETATION.—No liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of section 6103.

(c) DAMAGES.—In any suit brought under the provisions of subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of—

(1) actual damages sustained by the plaintiff as a result of the unauthorized disclosure of the return or return information and, in the case of a

willful disclosure or a disclosure which is the result of gross negligence, punitive damages, but in no case shall a plaintiff entitled to recovery receive less than the sum of $1,000 with respect to each instance of such unauthorized disclosure; and

(2) the costs of the action.

(d) PERIOD FOR BRINGING ACTION.—An action to enforce any liability created under this section may be brought, without regard to the amount in controversy, within 2 years from the date on which the cause of action arises or at any time within 2 years after discovery by the plaintiff of the unauthorized disclosure.

26 U.S.C.A. SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) TAX.—Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

26 U.S.C.A. SEC. 7429. REVIEW OF JEOPARDY ASSESSMENT PROCEDURES.

(a) ADMINISTRATIVE REVIEW.—

(1) INFORMATION TO TAXPAYER.—Within 5 days after the day on which an assessment is made under section 6851(a), 6861(a), or 6862, the Secretary shall provide the taxpayer with a written statement of the information upon which the Secretary relies in making such assessment.

(2) REQUEST FOR REVIEW.—Within 30 days after the day on which the taxpayer is furnished the written statement described in paragraph (1), or within 30 days after the last day of the period within which such statement is required to be furnished, the taxpayer may request the Secretary to review the action taken.

(3) REDETERMINATION BY SECRETARY.—After a request for review is made under paragraph (2), the Secretary shall determine whether or not—

(A) making of the assessment under section 6851, 6861, or 6862, as the case may be, is reasonable under the circumstances, and

(B) the amount so assessed or demanded as a result of the action taken under section 6851, 6861, or 6862 is appropriate under the circumstances.

(b) JUDICIAL REVIEW.—

(1) ACTIONS PERMITTED.—Within 30 days after the earlier of—

(A) the day the Secretary notifies the taxpayer of his determination described in subsection (a)(3), or

(B) the 16th day after the request described in subsection (a)(2) was made,

the taxpayer may bring a civil action against the United States in a district court of the United States for a determination under this subsection.

(2) DETERMINATION BY DISTRICT COURT.—Within 20 days after an action is commenced under paragraph (1), the district court shall determine whether or not—

(A) the making of the assessment under section 6851, 6861, or 6862, as the case may be, is reasonable under the circumstances, and

(B) the amount so assessed or demanded as a result of the action taken under section 6851, 6861, or 6862, is appropriate under the circumstances.

(3) ORDER OF DISTRICT COURT.—If the court determines that the making of such assessment is unreasonable or that the amount assessed or demanded is inappropriate, the court may order the Secretary to abate such assessment, to redetermine (in whole or in part) the amount assessed or demanded, or to take such other action as the court finds appropriate.

(c) EXTENSION OF 20 DAY PERIOD WHERE TAXPAYER SO REQUESTS.—If the taxpayer requests an extension of the 20 day period set forth in subsection (b)(2) and establishes reasonable grounds why such extension should be granted, the district court may grant an extension of not more than 40 additional days.

(d) COMPUTATION OF DAYS.—For purposes of this section, Saturday, Sunday, or a legal holiday in the District of Columbia shall not be counted as the last day of any period.

(e) VENUE.—A civil action under subsection (b) shall be commenced only in the judicial district described

in section 1402(a)(1) or (2) of title 28, United States Code.

(f) FINALITY OF DETERMINATION.—Any determination made by a district court under this section shall be final and conclusive and shall not be reviewed by any other court.

(g) BURDEN OF PROOF.—

(1) REASONABLENESS OF TERMINATION OR JEOPARDY ASSESSMENT.—In an action under subsection (b) involving the issue of whether the making of an assessment under section 6851, 6861, or 6862 is reasonable under the circumstances, the burden of proof in respect to such issue shall be upon the Secretary.

(2) REASONABLENESS OF AMOUNT OF ASSESSMENT.—In an action under subsection (b) involving the issue of whether an amount assessed or demanded as a result of action taken under section 6851, 6861, or 6862 is appropriate under the circumstances, the Secretary shall provide a written statement which contains any information with respect to which his determination of the amount assessed was based, but the burden of proof in respect of such issue shall be upon the taxpayer.

Office-Supreme Court, U.S.
FILED
AUG 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-118

In the Supreme Court of the United States

OCTOBER TERM, 1980

KEMLON PRODUCTS AND DEVELOPMENT COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Commissioner v. *Shapiro*, 424 U.S. 614 ..... 3, 4, 5

Enochs v. *Williams Packing & Navigation Co.*, 370 U.S. 1 ..... 3, 4

Phillips v. *Commissioner*, 283 U.S. 589 ..... 4, 5

Statutes:

Anti-Injunction Act, 26 U.S.C. (& Supp. III) 7421(a) 1

Internal Revenue Code of 1954 (26 U.S.C.):

Section 6103 2

Section 6103(k)(6) 2, 4

Privacy Act of 1974, 5 U.S.C. 552a(b) 2-3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-118

KEMLON PRODUCTS AND DEVELOPMENT COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek review of the decision below holding that their action, which seeks to enjoin the Internal Revenue Service from disclosing tax return information of petitioner Kemlon Products and Development Company (Kemlon) to any of its business customers, is barred by the Anti-Injunction Act, 26 U.S.C. (& Supp. III) 7421(a).

The pertinent facts may be summarized as follows: Kemlon and Keystone Engineering Company are engaged in the research, development, manufacturing and sale of certain patented products for use in the oil and gas industry. In December 1976, the Internal Revenue Service initiated an audit of the corporation's tax returns for their taxable year ended September 30, 1975. In the course of examining Kemlon's tax returns, the Service questioned the accuracy of depreciation deductions claimed with respect to a certain

patent held by Kemlon in connection with the production of a ceramic electrical conductor. In particular, the Service questioned whether a portion of the value assigned to a patent by Kemlon should have been allocated to other assets, such as goodwill. The Service was also concerned about the useful life of the patent. Kemlon provided the Service with all information requested concerning the patent (Pet. App. A-3).

The agent in charge of valuing the patent, Engineering Agent Gary D. B. Brown, concluded that it would be necessary to meet with customers of Kemlon in order to obtain information concerning the products, the customers' use of the products and their dealings with Kemlon. Counsel for Kemlon objected that the Service's questioning of Kemlon's customers would disrupt its confidential business relationships and would constitute unauthorized disclosure of tax return information in violation of Section 6103(k)(6) of the Internal Revenue Code of 1954 (26 U.S.C.). Kemlon's counsel offered to obtain the desired information from third parties or, alternatively, to arrange a meeting with the customers if Agent Brown would furnish in advance the questions to be asked. Agent Brown consulted with other Service officials, who determined (a) that the valuation of the patents required an interview with Kemlon's major customer and (b) that such an interview would not violate Section 6103 (Pet. App. A-3, A-4).

Kemlon and the other petitioners commenced this suit in the United States District Court for the Southern District of Texas, seeking to enjoin Agent Brown and the Service from disclosing directly or indirectly Kemlon's return information to Kemlon's customers. Kemlon claimed that such an injunction did not come within the bar of the Anti-Injunction Act and that disclosure of the return information would violate Section 6103(k)(6) of the Code, the Privacy Act of 1974, 5 U.S.C. 552a(b), and, in addition,

Kemlon's constitutional right to privacy. Kemlon alleged that disclosure of the fact that Kemlon was being audited would cause substantial and irreparable harm for which no adequate remedy existed at law, *i.e.*, a loss of business reputation and the opportunity for Kemlon to work on new and other patentable products (Pet. App. A-5, A-15). In support of this allegation, Kemlon submitted the affidavit of petitioner John H. Ring, a shareholder. The affidavit did not, however, elaborate on how the purported harm would come about (Pet. App. A-5).

The district court granted Kemlon's request for an injunction. Although it held that the action was within the scope of the Anti-Injunction Act, it concluded that petitioner satisfied the two conditions of the exception to the Act established by *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), *i.e.*, where a taxpayer demonstrates (1) that irreparable harm otherwise will occur and (2) that the government cannot possibly prevail on the merits of the underlying controversy. Noting that Kemlon had made a " 'substantial claim of irreparable injury,' " the court ordered the Service, on the authority of *Commissioner* v. *Shapiro*, 424 U.S. 614 (1976), to submit to Kemlon the questions it intended to ask its customers in order that Kemlon could have an opportunity under *Williams Packing* to prove that it might prevail on its Section 6103 claim. The Service declined to give the questions to Kemlon but submitted them to the district court, sealed for in camera inspection, after requesting that the court either certify its order for appeal or, alternatively, issue an injunction which could be appealed. The court thereupon issued an injunction barring the Service from disclosing return information to Kemlon's business customers (Pet. App. A-6 to A-9).

The court of appeals reversed. It held that Kemlon failed to demonstrate irreparable harm merely by its conclusory allegation that it would lose customers as a result of disclosure of the fact that it was under audit. The court further stated that even assuming arguendo that Kemlon met its burden of proving irreparable harm, the government had at all events come forward with basic facts to show that it may prevail on Kemlon's Section 6103(k)(6) claim (Pet. App. A-2, A-16 to A-18).

1. Petitioners do not even allege any error in the court of appeals' holding that Kemlon failed as a matter of law to meet its burden of proving irreparable harm as required by *Williams Packing*. That ruling disposes of petitioner's claim for injunctive relief. Indeed, the court of appeals found that Kemlon's claim in this regard was frivolous. As it stated, "[t]o describe Kemlon's allegation of irreparable harm is to decide this case" (Pet. App. A-15). As we have noted, Kemlon alleged essentially that disclosure of the fact that it was under audit would cause it to lose customers because of concern for its financial stability. But as the court of appeals observed: "It in no way alleged or proved facts indicating how its customers would infer financial instability from knowledge of an audit. It in no way alleged or proved facts showing how disclosure of an examination into the value of its patents would indicate financial instability" (Pet. App. A-16).

2. Petitioners further contend (Pet. 8-13) that the court of appeals erred in its alternative holding that the government in any event had satisfied the requirement of *Commissioner* v. *Shapiro, supra*, to show that it might prevail on Kemlon's Section 6103(k)(6) claim. But absent a showing that petitioner would suffer irreparable injury, its argument in this regard is immaterial. At all events, petitioners err in contending that *Shapiro* and *Phillips* v. *Commissioner*, 283 U.S. 589 (1931), require the government to demonstrate

something more than that it might ultimately prevail on the merits. *Phillips* upheld the validity of a summary tax collection procedure in issue there. And *Shapiro* plainly held only that, assuming a preliminary showing of irreparable harm to the taxpayer, the government must disclose basic facts from which it appears that the Government may prevail (424 U.S. at 627-628). And petitioners do not dispute the court of appeals' conclusion that the government made such a showing here.

3. Finally, petitioners contend (Pet. 13-16) that a taxpayer has a constitutional privacy interest in preventing disclosure of the fact that it is being audited. But apart from the fact that petitioners did not so argue before the court of appeals, they can hardly claim that the government violated such a right because the disclosure of that fact was occasioned by their commencement of this very suit.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1981

DOJ-1981-08

Office - Supreme Court, U.S.
FILED
SEP 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-118

In the Supreme Court of the United States

OCTOBER TERM, 1980

KEMLON PRODUCTS AND DEVELOPMENTS COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Edward D. Urquhart
Sponsel, Urquhart & Ross
50 Briar Hollow Lane, Suite 320 West
Houston, Texas 77027
(713) 840-0920
ATTORNEY FOR PETITIONERS

TABLE OF AUTHORITIES

Page

Cases:

Commissioner v. Shapiro, 424 U.S. 614 2,4,5,6

Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 1,3,5,6

Massachusetts Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479 7

Phillips v. Commissioner, 283 U.S. 589 6

U.S. v. First Nat'l City Bank, 568 F.2d853 5

Statutes:

Anti-Injunction Act, 26 U.S.C. (& Supp. III) 7421(a) 25

Internal Revenue Code of 1954 (26 U.S.C.): Section 6103(k)(6) 4

Privacy Act of 1974, 5 U.S.C. 552a(b) 2-3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-118

KEMLON PRODUCTS AND DEVELOPMENTS COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The "Memorandum For the Respondents In Opposition" opposes the petition on three grounds, all of which are erroneous.

First, respondents charge that petitioners have not alleged any error in the court of appeals' holding that Kemlon failed as a matter of law to meet its burden of proving irreparable harm as required by *Enochs v. Williams Packing & Navigation Co.*, 370 U.S.1 (1962). Petitioners contend the specific issue of irreparable harm in this case is a subsidiary question fairly included within the "Question Presented" in the "Petition For Writ of Certiorari". Consistent with Rule 17, Rules of the Supreme Court, the petition herein was to direct the attention of this Honorable

Court to the "special and important reasons" warranting a review on writ of certiorari; namely, the hiatus in the statutory scheme of the Internal Revenue Code of not providing for "substantive due process" protection of taxpayers' rights to confidentiality and privacy.

In any event, petitioners have consistently maintained throughout the instant litigation that respondents waived the issue of irreparable harm in the district court. As pointed out in petitioner's brief to the court of appeals (pp. 43-45), the district court asked respondent's trial counsel if the government was not contesting the issue of irreparable harm and the reply was "That's correct". (Supplemental Record On Appeal, p. 46.) The reason respondent's trial counsel made such statement was that it had been previously agreed between the parties and the district court that respondents would only appeal the question of whether *Commissioner v. Shapiro,* 424 U.S. 614 (1976) provided the district court with jurisdiction to order respondents to provide petitioners with an opportunity to provide the unknown information being sought.

Once the court of appeals held respondents did not waive the issue of irreparable harm, petitioners explicitly contended error on this point in their petitions for panel rehearing and rehearing en banc. Especially noteworthy is the court of appeals' holding that "The Statements by the Service's attorney at the September 8, 1978, hearing, upon which Kemlon relies are ambiguous at best and do not support a finding of waiver of this issue" (Pet. App. A-13). Petitioners contend the statements by respondent's trial counsel were not ambiguous and that said counsel clearly agreed with the district court that the government was not contesting the issue of irreparable harm (See Supplemental Record On Appeal, p. 46).

After stating that respondent's trial counsel's statements were "ambiguous at best", the court of ap-

peals further gave the following two reasons for its holding that the government did not waive the issue of irreparable harm: (1) "the remainder of the record demonstrates the Service adamantly argued that Kemlon had not satisfied its burden of showing irreparable harm" (Pet. App. A-13) "and (2)" In the September 8, 1978, hearing, the Service expressly stated that there had been no stipulation with respect to the irreparable harm issue; rather the Service said that part of its argument was based on this element of the *Enochs* exception" (Pet. App. A-13-14).

With regard to the first reason, petitioners contend the remainder of the record on which the court of appeals relied [other than the September 8, 1978 hearing] occured, in time, prior to said hearing to-wit: the March 3, 1978, motion to dismiss (Record On Appeal, pp. 17-55) and the June 16, 1978, motion for reconsideration (Record on Appeal, pp. 87-106). It is after such dates that petitioners contend the government abandoned the issue of irreparable harm, i.e., at the September 8, 1978, hearing.

With regard to the second reason given by the court of appeals, petitioners contend it is erroneous wherein it states "the Service said that part of its' argument was based on this element [irreparable harm] of the *Enochs* exception" (Pet. App. A-14). In fact, however, the Service's attorney stated the following: "A part and parcel of our entire argument is to the extent there could be any harm, that harm could be repaired by the adequate remedy at law available...(Supplemented Record on Appeal, p. 44). It was after this statement that the Service's attorney went further and expressly admitted to the district court that the government was not contesting the issue of irreparable harm (Supplemental Record On Appeal, p. 46).

Therefore, it is clear that respondents were relying only on the adequate remedy at law issue along with their con-

tention that *Shapiro* was not applicable to this case. The "Petition for Writ of Certeriorari" filed in this case clearly demonstrates that petitioners remedy at law is inadequate and such argument will not be repeated herein.

Furthermore, respondents' argument regarding irreparable harm ignores the practical difficulties of a taxpayer being able to prove irreparable harm in a situation such as petitioners were placed in the district court. Petitioners had given the internal revenue agents valuable confidential information during the IRS audit. Although petitioners cooperated during the IRS audit, petitioners have never been allowed to know what questions the internal revenue agents desired to ask their customers regarding such information. Petitioners were never given the opportunity to provide the unknown information the internal revenue agents were seeking. Therefore, the court of appeals' opinion retroactively places petitioners in the predicament of having to prove that asking the questions would result in irreparable harm, without knowing the questions.

The districts court's May 22, 1978, "Order" ordered respondents to provide petitioners with the unknown list of questions, so that petitioners would have a fair opportunity to prove that the government could not ultimately prevail. (Pet. App. A-25-26.) Had respondents simply complied with such order of the district court, petitioners would have been able to address the issue of irreparable harm along with the issues under 26 U.S.C.A. Section 6103(K)(6) of whether the information sought was necessary or otherwise reasonably available. Also had respondents complied with such order of the district court, petitioners would thereby have been allowed "substantive due process" protection of their rights to privacy and confidentiality as they clearly have not been allowed by the holding of the court of appeals. Therefore, the issue of ir-

reparable harm in this case in a subsidiary question fairly included within the "Question Presented" in the "Petition for Writ of Certiorari", as allowed by Rule 21.1(a), Rules of the Supreme Court.

Respondents' second ground in their opposition brief, concerns the showing the government is required to make under the *Shapiro* case. (Memo. In Opp. pp. 4-5.) First, respondents erroneously contend the *Shapiro* case held that the government is only required to demonstrate that it might ultimately prevail after the taxpayer has made a showing of irreparable harm. To the contrary, the *Shapiro* case simply does not make such holding regarding the timing of the proff of the elements of the judicially created exception to the Anti-Injunction Act in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962). In fact, the Court in *Shapiro* stated the following:

> This Court has recently and repeatedly held that, at least where irreparable harm *may* result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause required that the party whose property is taken be given an opportunity for the same kind of predeprivation or prompt past deprivation hearing at which some showing of the probable validity of the deprivation must be made. 424 U.S. at 629. (Emphasis Added)

The above quoted word "may" certainly implies that the taxpayer does not have to complete the proff of the irreparable harm element before the government is required to show the probable validity of the deprivation. On this very point, in *U.S. v First Nat'l City Bank,* 568 F.2d 853 (2nd Cir. 1977) the Second Circuit interpreted the holding of *Shapiro* as being that "a taxpayer would be entitled to injunctive relief if (1) he could show a *likelihood* of irreparable harm and (2) the Government could not establish a factual basis for its assesment." 568 F.2d at 856. (Emphasis Added). The district court in the instant case held in its May 22, 1978, "Order", that "plaintiffs have

made a substantial claim of irreparable injury as required by *Enochs.*" (Pet. App. A-25) The court of appeals' opinion did not hold that the district court abused its discretion in making such a holding. Furthermore, the district court's "Findings of Fact and Conclusions of Law" specifically held that petitioners had established irreparable harm as a result of respondents' statements that the government was not contesting the issue of irreparable harm. (Pet. App. A-28-32.) The court of appeals' opinion also did not hold the district court abused its discretion in making such further holdings. For the above reasons, therefore, petitioners contend respondents' argument is in error wherein it implies the government was not required to make any showing under *Shapiro.* Also, respondents' contention that "petitioners do not dispute the court of appeals' conclusion that government made" the requisite showing under *Shapiro* erroneously ignores the language of the petition at pages 12-13 thereof.

Respondents' argument regarding the timing of the proof of the element of irreparable harm also ignores the requirement of *Shapiro* and *Phillips,* as more fully explained in the petition filed herein, that there must be an opportunity for a full adjudication on the ments, i.e., "substantive due process," before the government can proceed upon a mere showing that its proposed action is possibly correct.

Respondents' third and final ground in its opposition brief first contends petitioners' constitutional right to privacy argument is only concerned with the fact that they are being audited. The record in this case is clear that petitioners were and are primarily concerned about the valuable and confidential information they voluntarily turned over to the internal revenue agents. Petitioners do know that questions to their customers concerning such information could very easily destroy the value of such information. Until petitioners allowed a full adjudication on

the merits of the validity of the government's unknown questions, they are simply being denied "substantive due process" protection of their right to privacy as explained in the petition filed herein.

Second, respondents' contention that petitioners' commencement of this suit to protect their right to privacy destroys their right to privacy is patently absurd. A holding by any court to such effect would totally eviscerate all statutory and constitutional rights to privacy and confidentiality.

Finally, respondents contention that petitioners did not argue the constitutional right to privacy issue before the court of appeals is in error. A review of petitioners' brief to the court of appeals, at pages 28-29 and 31-43 thereof, clearly shows that petitioners did make such argument to the court of appeals. Furthermore, the court of appeals' original opinion, at footnote 8, acknowledged that petitioners raised such argument, but erroneously held that it would not consider such argument because petitioners did not cross-appeal the district courts ruling against such argument. After petitioners pointed out the error of such holding in their petitions for rehearins, via the holding in *Massachusetts Mut. Life Ins. Co. v Ludwig,* 426 U.S. 479 (1976), the court of appeals inconsistently and despite petitioners' brief, held on rehearing that petitioners had not raised such argument on appeal.

It is therefore, respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Edward D. Urquhart
Sponsel, Urquhart & Ross
50 Briar Hollow Lane, Suite 320 West
Houston, Texas 77027
(713) 840-0920
ATTORNEY FOR PETITIONERS